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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT.

BY
WILLIAM G. SHAW.

VOL. 35.
NEW SERIES, VOL. 6.

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JUDGES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,	}	ASSISTANT JUDGES.
HON. JOHN PIERPOINT,		
HON. JAMES BARRETT,		
HON. LOYAL C. KELLOGG,		
HON. ASAHIEL PECK,		

ERRATA.

Page 173, line 12 from top, between *should* and *equal* insert *be*.

“ 291, line 17 from top, between *sufficient* and *for* insert *cause*.

“ 351, line 6 from top, for *purchases* read *purchaser*.

“ 577, line 8 from top, for *fraudulent* read *false*.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
AT THE
GENERAL TERM
HELD AT
MONTPELIER, NOVEMBER, 1861.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS, HON. JOHN PIERPOINT, HON. JAMES BARRETT, HON. LOYAL C. KELLOGG, HON. ASAHIEL PECK,	} ASSISTANT JUDGES.
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Perrin v. Reed.

PHILANDER PERRIN v. WILLIAM F. REED AND CHESTER L. REED.

Levy of Execution. Record. Deed. Notice. Attachment.

Quere, whether the statute of 1864,* relative to the appraisal of real estate situated in two or more adjoining towns in the case of a levy of execution thereon, applies to the case of a levy of an execution upon two pieces of land not adjoining each other, but situated in adjoining towns. **PIERPOINT, J.**

But if, in such case, the appraisers are appointed partly from both towns, the defect, if any, in the mode of appointing them, is so merely informal as to be cured by the neglect of both parties to apply within two years to the supreme court to vacate the levy, under the 49th sec. of chap. 45 of the Compiled Statutes, (Sec. 26, chap. 47, General Statutes.)

The fact that an execution is levied upon real estate without noticing a mortgage which exists upon it, is a matter of which the debtor cannot complain.

The record of a deed in one town conveying land in such town is not of itself constructive notice of the conveyance by the same deed of land lying in another town.

But if one sees such record, and reads it and has such knowledge of the premises as to know from the description that the land in the other town was conveyed by the deed so recorded, this constitutes notice of the conveyance of the land in such other town.

An attaching creditor of real estate with notice, either actual or constructive, of the true state of the debtor's title, is bound by such notice, and stands in no better position than a purchaser with the same notice.

But notice of the sale of personal property without change of possession will not affect the claim of an attaching creditor of the vendor thereto.

EJECTMENT for a tract of land in Williamstown. Plea the general issue, and trial by jury at the January term, 1861, in Orange County.

The plaintiff introduced the copy of a deed from Andros Reed to Andros A. Reed, dated December 10th, 1842, describing the land sued for, and also other land in Brookfield, and being what is called the Reed farm.

*Which is as follows: "Whenever an execution is extended on any real estate situated in two or more adjoining towns, the same shall be appraised by three judicious and disinterested appraisers of the vicinity, residing in either of the towns in which part of such real estate is situate, who shall be appointed in the same manner as is now provided for in other cases. See sec. 22, chap. 47, General Statutes.

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The plaintiff then introduced a writ in his favor against Andros A. Reed, dated April 19th, 1852, and served in Brookfield on the same day, and in Williamstown by attaching all the land in Williamstown, on the 20th of April, 1852; also the record of a judgment on said writ, and levy of execution thereon, against Andros A. Reed, rendered in July, 1854, on which execution was issued, which execution was levied upon the land in question December 6th, 1854.

To the admission of this levy the defendants objected on the ground that the appraisers did not reside, and were not freeholders in the town where the land lay, and because there were two separate and distinct pieces of land set off in the same levy, not connected, but being from two to three miles apart, and lying in different towns, and both appraised by the same men, and it was admitted by the plaintiff that two of the appraisers resided in Brookfield, and the other in Williamstown.

The court overruled the objection *pro forma*, and admitted the record of the levy, and for the purposes of the trial treated it as valid; to which the defendants excepted.

The defendants introduced a deed from Andros A. Reed to Andros Reed, dated March 12th, 1849, of the Reed farm, containing land in Brookfield and Williamstown, including the land sued for in this action, which deed was recorded in Brookfield, March 12th, 1849, and in Williamstown, April 26th, 1852; also a deed from Andros and Polly Reed, to Andros A. and William F. Reed, dated March 13th, 1851, and recorded in Brookfield the same day, and recorded in Williamstown, April 26th, 1852, of the same land; also a mortgage deed from Andros A. Reed and William F. Reed to Andros Reed, dated March 13th, 1851, and recorded in Brookfield, March 14th, 1851, and in Williamstown, April 26th, 1852, of the same land, which deed was to secure the maintenance of the said Andros Reed and his wife and daughters, and to pay his debts; accompanied with proof that the said Andros and one daughter was still living, and supported by the defendant, William F. Reed, and that a portion of the debts were still unpaid.

The defendants then introduced testimony tending to prove that the plaintiff, at the time he made the attachment of said

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land in Williamstown, had full knowledge that the same had been conveyed by Andros A. Reed to Andros Reed, together with the other conveyances of the same land as contained in the deeds above referred to, and introduced by the defendants. This evidence was objected to by the plaintiff, but admitted by the court; and the plaintiff introduced testimony tending to prove that he had no such notice.

The evidence tending to show such notice, consisted of evidence tending to show that on the evening of the plaintiff's attachment in the town of Brookfield, being the evening before the attachment in Williamstown, and before either attachment was made, the plaintiff went to the town clerk's office in Brookfield, to see if any previous attachment or conveyance of real estate of Andros A. Reed had been made, and that he there read the record of said deed from Andros A. Reed to Andros Reed, and of the other subsequent deeds, and read the description of the lands therein.

The plaintiff objected to the introduction of this evidence on the following grounds :

1. That notice of a prior unrecorded deed of the judgment debtor, would not affect the rights of an attaching creditor.

2. That as this deed was not recorded in Williamstown, it was to be regarded, as to the premises in question, as an unrecorded deed, and that the reading of the record of it in a different town from that where the land was situated, was no notice that any such original deed existed as the record indicated. The court admitted the evidence as competent to go to the jury, to which the plaintiff excepted.

This was the only evidence of notice to the plaintiff, before the attachment, of the deed from Andros A. Reed to Andros Reed, dated March 12th, 1849, or that Andros A. Reed had conveyed away the premises, except evidence tending to show that the plaintiff had such previous information as to the Reed farm, that on reading the description of the land purporting to have been conveyed by the deed, he might have known that it purported to convey the premises in question.

The plaintiff also introduced the record of a quit claim deed of the same land from W. F. Reed to David W. Reed,

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dated November 8th, 1852, and recorded the same day in both towns.

The defendants then introduced a deed of the same land from the said David W. Reed and his wife to the defendant, Chester L. Reed and to Emily B. Reed, the wife of the defendant, William Reed, dated January 25th, 1855, and recorded the same day.

The defendants claimed, and requested the court to instruct the jury, that if, from the proof, they should find that the plaintiff was informed and had knowledge of the existence of said deed from Andros A. Reed to Andros Reed, dated March 12th, 1849, and the other deeds and conveyances of said land, before he made his said attachment, the defendants were entitled to a verdict; that although by the deed from Andros and Polly Reed to Andros A. Reed and William F. Reed, dated March 18th, 1851, Andros A. Reed would appear to own one undivided half of the land, still, as there was an outstanding mortgage on said land back to said Andros, the plaintiff could not levy upon the equity of redemption of the said Andros A. Reed, in the manner of this levy, nor would the levy entitle him to hold one half of the land.

But the court refused to charge as requested, but did charge, among other things not objected to, that if the jury should find that the plaintiff had notice before his attachment that the premises in question had been conveyed to Andros Reed, still the plaintiff's attachment and levy would hold one undivided half of the premises which Andros A. Reed acquired by the deed to him and William F. Reed, dated March 18th, 1851, although that deed was not recorded in Williamstown till after the attachment; and that neither the fact that the levy was upon the entire estate in the premises, instead of an undivided half, nor the fact that the levy was made without noticing the mortgage to Andros Reed, could be set up by the judgment debtor, or these defendants, to avoid the levy, or to prevent its operation to vest in the plaintiff the undivided half owned by Andros A. Reed, the execution debtor; and that, although, as between the plaintiff and Andros Reed, the mortgagee, the plaintiff might take it subjected to the mortgage, yet the defendants could not set up that mortgage to defeat a recovery in this action.

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The jury returned a verdict for the plaintiff for one undivided half of the premises.

To the refusal of the court to charge as requested, and to the charge as given, the defendants excepted.

Hebard & Martin for the defendants.

C. W. Clarke and Peck & Colby, for the plaintiff.

PIERPOINT, J. It is insisted by the defendants in this case that the levy of the execution on which the plaintiff bases his right to recover is void by reason of irregularities in the proceedings of the officer in making it.

It appears from the case that the land in controversy is one of two pieces of land that were set off at the same time, lying separate from each other, one piece situate in Brookfield and the other in Williamstown, two adjoining towns. The land in controversy is in Williamstown. It is conceded that two of the appraisers were appointed from Brookfield and one from Williamstown. This, it is insisted, invalidates the levy. By the 23rd section of the statute relating to the levy of executions, it is provided, that when an execution is extended on any real estate, the same shall be appraised by three judicious and disinterested freeholders of the vicinity, residing in the town in which such estate lies. If the question rested solely upon the construction and effect of this section, the position taken by the defendants' counsel would be entirely sound,—there would have been such a departure from the requirements of the statute as would render the levy void. But by the act of 1854 it is provided, that "when execution is extended on any real estate situate in two or more adjoining towns, the same shall be appraised by three judicious and disinterested freeholders of the vicinity, resident in either of the towns." This statute would seem to be sufficiently broad in its terms to cover a case like the present, but it is argued that this statute was intended to apply only to cases where an execution is extended upon a piece of land across which the town line runs, the land all lying together in one piece, and not to detached parcels lying in the different towns. That

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such may fairly be said to have been the intention of the legislature, is undoubtedly true, but on the other hand, the language used is broad enough to embrace both cases. But we think it is not necessary now to determine the question as to the construction of the act of 1854, inasmuch as the case comes clearly within the provisions of the 49th, 50th, 51st and 52nd sections of the 45th chapter of the Compiled Statutes relating to the levy of executions, wherein it is provided that when a levy is "irregular, informal, or not made according to the strict rules of law," either party may apply to the supreme court, either to annul and set aside such levy, or affirm it, within two years from the time such levy is returned, and that if neither party avails himself of such privilege, within such time, then the levy shall be deemed to be good and valid to convey all the right, title or interest the judgment debtor had therein at the time of the levy; and shall be conclusive evidence of title in such estate, against such debtor or his representatives. I apprehend it would be very difficult to fix upon any definite rule by which to determine the precise extent to which this statute would operate to cure defects in the levy of executions. That must necessarily depend upon the peculiar characteristics of each individual case.

In this case all the forms prescribed by statute have been complied with; no question is made as to the character or ability of the men appointed to make the appraisal, or as to the manner in which they discharged the duty, or as to the perfect good faith of all parties engaged in making the levy, neither is it claimed that any injustice has been done. The magistrate, in appointing the appraisers, evidently intended to comply with the act of 1854; if he erred in the construction of it, it is not remarkable, for we are not entirely agreed as to it, after full argument. The whole case, taken together, is one where the effect of the levy may well be considered as doubtful, and the parties having acquiesced therein for the period of two years, it is now too late for the defendants to take advantage of any such defect.

The fact that the plaintiff set off the whole premises without noticing the mortgage, is a matter of which the debtor cannot complain. He is in no respect injured thereby. His whole interest in the estate is taken, and if the creditor was willing to

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take it on the debt, at its full value, without deducting the mortgage, that cannot prejudice the debtor, and is not an irregularity of which he can take advantage. The ruling of the court in this respect we think was correct.

The plaintiff excepted to the rulings of the court as to the admission of the evidence offered to show notice to the plaintiff of the existence of the deed of the premises in question from Andros A. Reed to Andros Reed, and also as to its effect, if found to be true. The recording of a deed in one town conveying land in such town, is of itself no notice of the conveyance by the same deed of lands lying in another town, in which such deed is not recorded. This principle was recently recognized in a case decided in Rutland County, in which one Lapham and the Danby Bank were parties, not yet reported; indeed, no such effect is claimed for it in this case. But the evidence offered was not only that the deed was so recorded, but that the plaintiff had actual knowledge of the fact, had examined it, read the description of the premises conveyed, and had such knowledge of the premises in question as to know from the description that the deed conveyed the premises. This we think was clearly evidence tending to show such knowledge, and such evidence as he would be bound to regard. It is not a mere copy of a deed which he examines, but a record, in its appropriate place, made by a public officer, and in accordance with the requirements of law. Such an examination would be just as satisfactory to the party, and as effectual in law, as an examination of the original deed. There is a bare possibility of a mistake, but a party, with such knowledge, cannot avoid its effect on the ground of such a possibility.

As to the effect of such notice, the rule seems to be now well settled in this state that an attaching creditor of *real estate* with notice, either actual or constructive, of the true state of the debtor's title, stands in no better position than a purchaser with the same notice. This doctrine is fully recognized in the case of *Hackett v. Callender et al.*, 32 Vt. 97.

The rule is different as to personal property which the vendee suffers to remain in the possession of the vendor. Such a sale the law regards as fraudulent, and void as to creditors, for the

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want of a change of possession. A creditor with full knowledge of such a transaction, only has notice of a sale, that in law is void as to him.

We find no error in the rulings or charge of the court below. Judgment is affirmed without cost to either party in this court.

EDWIN GOODWIN v. LUKE BUZZELL.

Statute of Limitations. Acknowledgment.

A debtor was summoned as the trustee of his creditor. He denied any liability to the creditor, and intended to appear and defend the trustee action, but, forgetting the day of trial, was adjudged trustee by default. *Held*, that neither the rendition of this judgment, nor the payment of it by the debtor, was such an acknowledgment of the creditor's claim as would prevent the operation of the statute of limitations.

Statements by a debtor, who, in the same conversation, denies the justness of an account, that, *if the other party would swear to it, he would pay it*, and that *he did not think the account just, but if it was just, he would pay it*, are not such acknowledgments of the debt as will take it out of the statute of limitations.

BOOK ACCOUNT. The auditor reported that the plaintiff's account was for a quantity of boxes sold and delivered by him to the defendant, in July and August, 1852, in the State of Maine, where the parties then resided. The auditor found that the defendant was liable to pay the same to the plaintiff unless it was barred by the statute of limitations, by reason of the following facts :

From the time the plaintiff's account accrued the defendant at all times claimed that it was wrong. He removed into this state in March, 1854, and has resided here ever since. The writ in this case was served on the defendant December 2nd, 1859. About the time of the service of the writ the defendant had a conversation with the plaintiff's attorney about this account and claimed that he did not owe it, but added "if Goodwin will

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swear to that account I will pay it." A few days afterwards he said to the same attorney, "I do not think that account is just, but if it is just I will pay it."

After the commencement of this suit the defendant was summoned as the trustee of the plaintiff in an action in favor of one Black against the plaintiff. On the return day of the writ in this trustee suit the defendant appeared before the court to defend against being adjudged liable as the plaintiff's trustee, and the cause was continued until the 14th January, 1861, at which time the defendant did not attend, having forgotten the day of hearing, and was consequently adjudged trustee of the plaintiff by default, in the amount of the plaintiff, Black's, account, which judgment the defendant afterwards paid to Black, amounting to \$51.55. This payment of \$51.55 the defendant offered in this action as an offset to the plaintiff's account, and by the plaintiff's consent it was allowed in offset.

Upon this report the county court at the June Term, 1861, in Caledonia county, POLAND, CH. J., presiding, rendered judgment for the defendant, to which the plaintiff excepted.

A. J. Willard, for the plaintiff.

J. Ross, for the defendant.

ALDIS, J. The plaintiff's account is barred by the statute of limitations, unless the alleged part payment or acknowledgements remove the bar. Comp. Stat. p. 379, § 14. Acts of 1854, No. 18.

I. The defendant was sued as the trustee of the plaintiff. He appeared to defend, denying that he was trustee. The case was continued. The defendant forgot the day to which the suit was continued and did not appear, and so judgment passed against him as trustee. He paid the judgment so obtained against him, and now pleads it in offset. Do these facts constitute an acknowledgement of the debt by part payment?

Ordinarily payment of part of a particular debt is an admission that the debt is due; for men do not make payments upon debts that are not due. Payment of a part of a promissory note,

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unaccompanied by any fact or circumstance at the time of payment to show that the remainder is not due, implies that the rest of the note is due. So payment of interest is most significant to show that the principal is acknowledged to be due. *Ayer v. Hawkins*, 19 Vt. 28; *Bradfield v. Tupper*, 7 E. L. and Eq., 541.

PARKE, BARON, says "payment of interest is a fact which is evidence of the whole debt being due. It is by implication a promise to pay the debt." The note to this case by the American editors suggests a doubt whether part payment is *conclusive* evidence of a promise; and cites *Merriam v. Bagley*, 1 Cush. 77. That was the case of payment by an insolvent after a discharge of a part of the note; in which, as with bankrupts, an express promise is required to revive the debt.

We take it that the rule is, where there is part payment of a debt, and no fact or circumstance attending the payment to show that the remainder is not due, then *the law implies* an acknowledgement of the remainder of the debt to be due. But where there is any circumstance connected with the debt or its payment tending to show that the debtor by making part payment did not intend to acknowledge the rest of the debt to be due, then the part payment is to be weighed as evidence merely in connection with all the other circumstances, in order to determine whether the debtor did or did not intend to acknowledge the remainder of the debt. This is the substance of the decision in *Ayer v. Hawkins*, in the 19th Vt.

Davis v. Edwards, 6 Eng. L. and Eq. 520, was the case of a payment by the assignee of an insolvent under the order of the Insolvent's Court, and was held not to be a payment that could bind the debtor as an acknowledgement. The same point has been decided in the same way in Massachusetts; see *Roscoe v. Hale*, 7 Gray 274; *Stoddard v. Doane*, 7 Gray 387, and 13 Gray 381. "Such payment," Judge BIGELOW well remarks, "being the result of proceedings intended for the relief of the debtor, and in which by paying part he seeks to be discharged from the whole of his debts, it is impossible to torture it into evidence of a new promise." See also *Walker v. Butler*, 37 Eng. L. and Eq. 13, decided in 1856.

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In ——— v. ———, 4 Mich. 508, it was held that part payment was not acknowledgement if accompanied by any fact or circumstance inconsistent with a promise to pay the remainder.

In the case at bar there is nothing in the payment by the defendant tending to show an acknowledgment of the debt.

1. The report says "the defendant at all times claimed that the account was wrong." If making such claim he had personally paid a part of the account, the payment should be held as an acknowledgment only of so much of the account as he paid. It would be against his intent and unjust to hold him concluded by such payment to an admission of the rest of the debt, when he is at the very time protesting against the debt and his liability to pay it.

2. But payment of the judgment in the trustee process was not payment on this account. 1st, the judgment was not rendered upon the ground of the defendant's admitting a liability for this debt; but upon his denial of all liability by his appearing to defend on the first court day, and finally upon his neglect or forgetfulness in not appearing on the last court day. The defendant has done nothing to admit the account to be due. Even a general judgment by default might well be questioned as amounting to an admission of any particular debt; but however that might be there is here no admission of any debt to be due, but the contrary. 2d. The payment of the judgment was compulsory. The defendant's legal liability was made absolute by the judgment. His forgetfulness of the court day was not such mistake or accident as would entitle him to a new trial. Payment of the judgment therefore was inevitable. It can not be deemed the acknowledgement of any other debt; but only the doing of an act he was under a legal necessity of doing.

3. It was not payment upon this debt, but payment upon a debt against the plaintiff, and thereby creating a legal offset to any claim the plaintiff might have.

The defendant on the trial in this court claimed it not as payment, but as offset; and it was so allowed.

II. The acknowledgements. They do not come within the

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rule. Instead of being clear and unqualified admissions that the debt was due and the defendant willing to pay it, they are substantially denials of those facts. At least they so qualify the expressions as to rebut all intentions of a promise. 28 Vt. 504 and 642.

A recent decision in Orleans county* having reviewed all our decisions on this subject, and reaffirmed fully the doctrine in *Phelps v. Stewart*, in the 12th Vt., we deem any further reference to them unnecessary.

Judgment affirmed.

CHARITY C. FREEMAN v. ORVIS BATCHELDER.*Bastardy.*

In a prosecution for bastardy the respondent gave no other bond than the one given before the justice of the peace, as required by section 8 of chapter 71 of the Compiled Statutes, and did not personally appear before the county court. The county court having ordered the payment by him of certain sums in instalments to the mother, it was held, that in *scire facias* against the surety of the bond, judgment might be rendered for the sums due on such order at the commencement of the action, but not for the present worth of the instalments not yet due.

SCIRE FACIAS on a recognizance in a bastardy case taken before a justice of the peace, in which the defendant was bound as the surety of one Philbrook Batchelder, according to the provisions of the 3rd section of chapter 71 of the Compiled Statutes. Trial by the court at the March Term, 1861, in Washington county, PECK, J., presiding.

It appeared that the original case in the bastardy proceedings in which the recognizance was taken, was duly entered in the county court, and an appearance entered for the defendant by counsel, and a hearing had in court, and that the defendant was

**Moore v. Stevens*, 33 Vt. 308.

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adjudged guilty, and an order made by which the defendant was ordered to pay the plaintiff for the support of the child certain sums by instalments. The defendant in that suit did not appear therein personally, and never gave any recognizance in the case to abide or perform said order, nor any recognizance except the one taken before the justice. It appeared that no part of the order of court had been performed. The defendant's counsel claimed there could be no recovery or execution for any thing beyond the amount that had already become due and payable by the terms of said order. The plaintiff claimed to recover the whole amount of said order, both that which had, and that which had not become due and payable.

The court decided that the plaintiff should recover the sums that had already become due and payable, with interest thereon from the time the same fell due and payable, and the present worth of the remaining part of the sums so ordered to be paid, and rendered judgment and awarded execution accordingly, to which the defendant excepted.

L. O. Wheelock and C. H. Heath, for the defendant.

Wing, Lund & Taylor, for the plaintiff.

PIERPOINT, J. This proceeding is brought upon a recognizance entered into before the magistrate, before whom the principal therein was brought, and charged with being the father of a bastard child. The condition of the recognizance is that such person shall personally appear before the county court next to be held in the county, and answer to such complaint and abide the order of the court. It appears that such person did appear by counsel in court, had a trial, was found guilty, adjudged to be the father of the child, and was ordered to contribute to its support by paying the sums, and at the times, specified in such order. No other recognizance was entered into as provided for in the 8th or 9th sections of the statute relating to illegitimate children. Comp. Stat., chap. 71 ; General Statutes, chap. 74. The father did not comply with the order of the court, and pay the first instalment and the cost, as required, and this proceeding is

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instituted against the surety in said recognizance to enforce the payment. The county court rendered judgment for the amount then due under such order, and also for the then present worth of the remaining part of the sums so ordered to be paid, and the question now before us is as to the correctness of such judgment.

The 8th section of the 71st chapter Comp. Stat. provides that the father shall, during the term of the court in which the orders are made, enter into a recognizance, &c., with sureties, conditioned that he will abide and perform the order of the court, and that on entering into such recognizance, the one entered into before such justice shall be null and void. By the 10th section of the same chapter it is provided that in case the father shall fail to comply with the orders of payment, the county court before which such recognizance was entered into, may, from time to time, on motion of the mother, &c., enter up judgment on such recognizance, and award execution for the amount of the money mentioned in such order as the same shall become due. This provision does not in terms refer to a recognizance taken before the magistrate.

It has been held that when there is no surrender of the principal in cases of this kind, and no new recognizance, the original recognizance is held as a security that the principal shall perform the orders of the court in the premises. *Simons v. Adams et al.*, 15 Vt. 677. The result is that so far as security for the payment of money is concerned, in cases like the present, the original bond is the same in terms, and imposes the same obligation that a new one would. The object of taking it is the same, and in the majority of cases, I apprehend the original bond is the one on which the mother is compelled to rely for her security. It is returned into the county court by the magistrate with the other proceedings before him. Why then may it not be enforced in the same manner and by the same process that the other is? The statute does not in terms refer to it as before said, but the object and purpose of the statute was to furnish a speedy and cheap method by which the mother could enforce the payment of the money in case of a noncompliance with the order, and we think that it is no more than fairly carrying into effect the intent

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of the legislature, in enacting those provisions, to say that the prescribed remedy is applicable to the original recognizance the same as to the new one. Harmony in the proceedings is thus preserved, and no injustice can result therefrom to any one.

The judgment of the county court is reversed and the case remanded.

CHAMBERLIN FLETCHER v. HENRY F. PILLSBURY AND TRUSTEE, JONATHAN M. PILLSBURY.

Fraudulent Agreement. Payment. Trustee Process.

The payment by a debtor to a creditor of his debt, before it is due, in order to aid the creditor in his purpose of preventing his creditors from attaching the debt by means of the trustee process, is not void as within the statute against fraudulent conveyances, agreements, &c., chap. 104, sec. 23, Comp. Stat: Gen. Stat. chap. 113, sec. 32.

TRUSTEE PROCESS. The facts in the case appear sufficiently in the opinion of the court.

The county court, at the June Term, 1861, in Caledonia county, POLAND, CH. J., presiding, decided that the trustee was not chargeable, to which the plaintiffs excepted.

J. Ross, for the plaintiff.

E. A. Oahoon, for the trustee.

ALDIS, J. The trustee, on or about the 1st January, 1861, was indebted to the principal defendant in a note for \$381.44, payable in about a year thereafter. Being informed that the defendant's creditors were about to attach it by trustee process, he paid the note to the defendant in order to avoid being trustee, and to aid the defendant to place the amount of the note beyond the reach of creditors. Was such payment fraudulent

and void as being an act "to avoid the right, debt or duty of another," within the statute. For it is only by treating the payment as void and the money as being by legal construction in the hands of the trustee, that he can be held liable. The payment was made at the request of the principal defendant, and before the note had matured.

It is not claimed by the plaintiffs but that the debtor would have been justified in paying the note if it had been then due, though the motive might have been to aid the defendant in putting it beyond the reach of creditors. In such case it would have been doing only what he was then legally bound to do; and the act would have been strictly *mere payment*. Our statute against fraudulent conveyances does not provide that *payments*, though "made with the intent to avoid the right, debt or duty of another," shall be void.

The words of the act are "all fraudulent and deceitful conveyances—all bonds, bills, notes, contracts and agreements, all suits, judgments and executions made or had to avoid any right, debt or duty of another shall be null and void. Payments of a debt are not mentioned.

Where one to whom a debt is due has the debt transferred and made nominally payable to another instead of himself, in order to avoid the trustee process, such transfer is void, and the debt is still subject to the trustee process. Thus, where a note is by agreement between the payee and maker taken up and a new note given in exchange to some other person, but in reality for the payee, the transaction is fraudulent. Such transfer or new note comes clearly within the words of the statute—"conveyances, contracts, bills, notes."

Such are the cases of *Camp v. Scott*, 14 Vt. 387, and *Marsh v. Davis*, 24 Vt. 363.

In this case it is urged that as the note was not due, the maker could not pay it except with the consent or agreement of the payee, and therefore that the transaction was virtually an "agreement" within the meaning of the act.

But the "agreement" intended by the statute must, we think, be one by which an obligation is created from one party to another,—an obligation that might be enforced but for the

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statute annulling it because entered into *mala fide*. It does not mean the discharge of an obligation or debt by a creditor to a debtor upon payment. Such is not the ordinary meaning of the word. The transaction between the trustee and the defendant was simply payment of a debt. The debtor can always pay his debt, though not due, if the creditor will take the money. Can we fairly say that the statute prohibits such consent; that when it prohibits fraudulent agreements it thereby annuls the consent of the payee and the act of payment by the debtor; and and that this was contemplated by the use of the word "agreement?" This seems to us a forced interpretation of the language of the statute, and not admissible in the exercise of a liberal construction to repress fraud.

We are aware that as a moral question there seems but little difference between paying one's debt when not due with the intent to hinder creditors, and buying property at its full value with the like intent. In each there is a voluntary act, a fraudulent intent and a full consideration. But the purchase is within the letter of the statute,—it is both "contract" and "conveyance."

Notwithstanding the antiquity of this statute counsel have not been able to cite any case where payment with the fraudulent intent has been held as coming within the statute. Whether payment to the creditor to aid him in concealing his property from his creditors has been regarded in legislation as an act which it was not wise in policy to prohibit,—or has been overlooked and so not included in the statute,—may perhaps be a matter of doubt. If intended to be included, we think it had better be done by legislation in express terms, than by judicial construction.

It is obvious that there is one point of difference between the debtor and others who enter into fraudulent contracts—a point which may have been considered in framing the act. Those who enter into fraudulent contracts to aid a debtor to conceal his property are volunteers—they are under no obligation whatever to do what they engage in. The obligation of the debtor to pay his debt is originally honest and legal. In paying his debt he does what he is under legal obligation to do at some time.

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Payment by him is not therefore a mere volunteer act—it is only when he pays before the debt is due, that he does an act which can be said to be that of a volunteer.

We see nothing to impeach the conclusion of the commissioner that the note was originally given *bona fide* and for full value.

The judgment of the county court is therefore affirmed.

HOLTON JUDEVINE v. SIMEON GOODRICH.

Deed. Reservation. License.

In a deed of real estate a reservation of the buildings and stone upon the land, so situated as to be part of the realty, with the privilege of removing the same by a certain time, reserves no title in the grantor to the property so reserved, if not removed within the specified time.

Where one in reply to the request of another for a license to do something in respect to the former's property, did not intend to accede to the request, but purposely used language susceptible of a double interpretation in this respect, with the intention that the other party should derive the impression that he did accede to his request, and the other did derive such impression and relied on it, *held* that he was bound to the same extent as if he had in express words granted the license.

TRESPASS for taking a quantity of stone. The cause was referred and the referee made the following report :

"On the 4th of November, 1851, the plaintiffs being the owners of the 'French Meeting House' in Hardwick, and about three acres of land, on which the same was situated, conveyed the land by deed of that date, to Justus D. Goodrich, the son of the defendant, with the following reservations in the deed : 'Ever reserving the said meeting-house and meeting-house sheds, and all stones on the premises, and the privilege of getting said house, sheds and stone off from the premises till the 1st day of April, 1853. We having the privilege of leaving what stone we choose to at said time ; also the privilege of the use of said land that we may need in getting off said house, sheds and stone.

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During the month of June or July, 1852, we are to pay said Goodrich all damage we may be to his hay crop. We are also to have the privilege of passing and repassing to said house and sheds till said April, 1853, and said Goodrich the use, occupancy and possession of said lands from the 28th day of July, 1851. excepting the above named reservations. It is understood we are not to have the back wall to sheds or stone in the field, away from the meeting-house.'

"The defendant purchased and paid for the land, and at the defendant's request the deed was executed to his son.

"The stone described in the deed were the foundation stone of the buildings on the land. The plaintiffs removed the buildings, and a part of the stone before the 1st of April, 1853. The remainder of the stone the defendant took and converted to his own use on the 23rd of April, 1853. The plaintiffs claimed (and Mr. Judevine testified) that about the middle of March Judevine called the defendant into his back store and suggested to him that it might be difficult to remove all the stone before the first of April, and requested the defendant to enlarge the time until he should begin to cultivate or use the land in the spring, and that the defendant assented to the request. The defendant admitted the interview and the request, but testified that he neither acceded nor refused to accede to the request—that in fact he made no answer. The parties were quite positive in their testimony upon this matter.

"It was proved that the defendant, as early as December, 1852, had consulted counsel as to his right to the stone, if they were not removed before the first of April, 1853. At the time Judevine requested him to enlarge the time I find that the defendant did not propose to accede to the request, or say that which would stimulate the plaintiffs to exertion to remove the stone before the first of April, but used such indifferent language that Judevine honestly inferred that the time when such stone were removed was a matter of indifference to the defendant, and acted upon such impression.

"If upon these facts the plaintiffs are entitled to recover, I find that they are entitled to recover the value of the stone taken by the defendant, amounting to \$22,20."

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Upon this report the county court, at the June Term, 1861, in Caledonia county, POLAND, CH. J., presiding, rendered judgment for the plaintiffs, to which the defendant excepted.

Peck & Colby, for the defendant.

Bliss N. Davis, for the plaintiffs.

KELLOGG, J. The reservation in the deed executed by the plaintiffs to the defendant's son, under whom the defendant justifies the trespass complained of, is qualified by the limitation of the time within which the plaintiffs were to take the property reserved off from the premises conveyed, and should have no other or greater effect than would result from a license to remove the property within the same period of time. The reservation is of a part of the realty, and on condition that the plaintiffs should remove the property reserved by the 1st April, 1853. The intention of the parties, as collected from the deed and the character of the transaction, was that the plaintiffs should have no right to the property after the 1st April, 1853, unless they removed it from the premises before that day. If the property was removed by that time, it belonged to the plaintiffs; but if not removed by that time, their right to it was gone. This seems to be the natural and obvious construction of the deed. When, therefore, the plaintiffs entered upon the premises after the 1st April, 1853, for the purpose of removing the stone off from the premises, they had lost all right to the stone, unless what took place between the plaintiff Judevine and the defendant, previous to the expiration of the time limited by the deed for the removal of the stone, should be regarded as being virtually equivalent to a license to allow the stone to remain there after the 1st April, 1853, with the privilege to the plaintiffs to remove them from the premises at any time before the defendant should begin to use or cultivate the land in the spring. If the defendant gave to the plaintiffs such a license and privilege, their right to the stone continued the same after as before the 1st April, 1853, as it is found by the referee that, before the expiration of the time within which this privilege was to be exercised,

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the defendant removed the stone from the premises, and appropriated the same to his own use. Although the plaintiffs, at the request of the defendant, executed the deed to his son, Justus D. Goodrich, yet it is found by the referee that the defendant purchased and paid for the land; and if the defendant gave to the plaintiffs this license and privilege, these facts, and the defendant's connection with the case, would, as we think, estop him after the plaintiffs had acted upon the license, from setting up against them his own want of authority to give it to them.

In reference to this question of license, the referee reports that the plaintiffs claimed (and Judevine testified) that about the middle of March, 1853, Judevine applied to the defendant and suggested to him that it might be difficult to remove all the stone before the first day of April, and requested him to enlarge the time for their removal until the defendant should begin to cultivate or use the land in the spring, and that the defendant assented to the request; that the defendant, admitting this interview and request, testified that he neither acceded, nor refused to accede, to this request, and that, in fact, he made no answer to it; and that the parties were quite positive in their testimony upon this matter. It appeared that some three months previous to this interview, the defendant had consulted counsel in respect to his right to the stone if they were not removed before the first day of April. The referee reports that, upon the testimony, he was of opinion that the defendant, at the time Judevine requested him to enlarge the time limited by the deed for the removal of the stone, "did not propose to accede to the request, or say that which would stimulate the plaintiffs to exertion to remove the stone before the first of April, but used such indifferent language that Judevine honestly inferred that the time when the stone were removed was a matter of indifference to the defendant, and acted upon such impression." If the defendant, as he claimed and testified, made no answer to Judevine's request, his passiveness or silence would not discredit the presumption of his acquiescence in that request, even if it would not, under the circumstances of the case, be considered as amounting to an express assent to it. We do not doubt that the issue made upon the testimony was susceptible of a more distinct resolution than the

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referee has furnished in his report; but we regard the fair import of the report as being substantially this:—that the “impression” upon which Judevine acted was not only produced by the “indifferent language” which the defendant used in reply to the application made to him for the extension of the time, but also that the “indifferent language” so used by the defendant was used with the design of producing this “impression.” The natural interpretation of the report in this respect is that although the defendant did not intend to accede to the request, he did design that Judevine should act upon the impression that he acceded to it, and that Judevine had a right, from the indifferent language used by the defendant, so to understand him, and to act upon such impression. If the defendant designed that Judevine should so understand him, he was bound to the same extent (even though the words used were susceptible of an entirely different construction) that he would have been if he had used express words of assent to the request, provided that Judevine in fact did so understand him, and acted under that impression. In that case the defendant’s “indifferent language,” though capable of an interpretation consistent with his concealed mental purpose, should be considered with reference to the sense and meaning which he intended to convey, rather than by the sense and meaning which he intended to conceal. The referee’s finding in favor of the plaintiffs’ right to recover must have rested upon this view of the case.

The objection that the plaintiffs can not support an action of trespass for the removal of the stone by the defendant and the appropriating of the same to his own use, if it was well founded, does not arise on the exceptions in this case. Unless it distinctly appeared that this objection was made in the county court, it could not become legitimately the subject of an exception to the judgment rendered in that court.

Judgment of the county court in favor of the plaintiffs affirmed.

Probate Court et al. v. Glead.

THE PROBATE COURT FOR THE DISTRICT OF LAMOILLE, BY.
CHARLES HUTCHINS, *Prosecutor*, v. THOMAS GLEED.

*Appeal from the Decision of Commissioners upon Claims against
the Estate of a Deceased Person.*

In the case of an appeal from the decision of commissioners on claims against the estate of a deceased person, where the appellant neglects to enter the appeal in the county court, and the appellee fails to enter the case for affirmance, no action can be maintained upon the bond given at the time of taking the appeal as required by section 20, chapter 52, Comp. Stat., even though no order of notice to the appellee of the appeal be made by the probate court, and no notice of the appeal be given him. ●

DEBT upon a bond. The facts in the case sufficiently appear in the opinion of the court.

The county court at the December Term, 1860, ALDIS, J., presiding, rendered judgement for the defendant, to which the plaintiff excepted.

Child & Benton, for the plaintiff.

The defendant *pro se*.

BARRETT, J. This suit is upon a bond given in pursuance of the statute, upon the taking of an appeal from the allowance of a claim against the estate of Perley Hutchins. It appears that no order of notice to the appellee was made by the probate court, nor was any notice of said appeal given, nor was the appeal entered by either party in the county court. The alleged breach of the bond consists in not having prosecuted said appeal; and in the argument it is claimed that it particularly consists in not having given notice of the appeal, agreeably to the requirement of the statute, and thereby the prosecutor was prevented from entering the case for affirmance, and so, having lost his claim under the allowance by the commissioners, he has a right to recover it by way of damages in this suit on the bond. Section 25 of chapter 52 Comp. Stat. is, "If the person objecting to a claim, and appealing on account of the allowance of such claim, shall neglect to enter his appeal, the court to which the appeal shall be taken on motion of the adverse party, producing attested

copies of such appeal, shall affirm the allowance appealed from, and may allow costs against the appellant." The statute thus provides a mode by which the claimant may perfect his claim, after its allowance is vacated by the appeal, into a final and conclusive judgment. The question is whether he must do so, in order to entitle him to resort to the bond for damages where the appeal is not entered by the appellant.

The condition of the bond is that the appellant shall prosecute his appeal to effect, and pay all intervening damages and costs occasioned by such appeal. It is obvious that if the appeal should be prosecuted to effect, there would be no intervening damages and costs accruing to the appellee. It is only in case of failure to prosecute the appeal to effect that, in contemplation of the law, such damages can accrue, however much in point of fact the appellee may be out of pocket on account of such appeal. The law, by its provisions, seems to contemplate that the appellant may cease or fail to prosecute at any stage after the appeal is taken. This is clearly indicated by the section already cited from the Compiled Statutes providing for the appellee procuring the allowance by the commissioners to be affirmed. It seems as clearly to indicate that the damages and costs provided for in the condition of the bond are predicable only in reference to a claim that has been substantiated in the manner prescribed by the statute. If the appellant should prosecute his appeal in due course of litigation by entering it and contesting the claim on its merits, and should be beaten and the claim should be substantiated by judgment of court, the damages recoverable on the bond, with costs, would have reference to the claim thus substantiated. If he fails to enter his appeal we think the appellee must cause his claim to be established by an affirmance of the allowance in the manner prescribed, before he can be allowed to assert that he has sustained damages in the sense of the law. The appeal vacates the allowance. The claim stands upon such appeal being taken, the same as if it had not been allowed. And if the parties see fit to let it rest there, without taking such further steps as the statute provides in such case, it must be regarded as operating as a discontinuance, with no foundation laid for ulterior proceedings. It cannot be said that the appellee

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has sustained damage in reference to his claim, for he has not in the way provided by the law established that he has any claim.

We do not think the law ever contemplated that the claimant might, after the allowance had been vacated by an appeal, lie by and take no steps to establish his claim in pursuance of the allowance, in the prescribed mode, and then come into the courts of law upon his bond, and there litigate *de novo*, and as a matter of original jurisdiction, the merits of his claim, upon the question of the amount of damages he was entitled to recover in his suit upon the bond. As before remarked, we think he must establish his claim under the allowance in the prescribed mode, before he can raise the question of damage occasioned by the appeal. All practical and prudential reasons bearing on the subject concur in supporting this view of the purposes of the statutory provisions in cases of this kind.

The analogy of the cases decided in this state, that, in order to entitle a party to recover more than nominal damages on an administrator's or guardian's bond, proceedings must be prosecuted in the prescribed mode, till the right of the claimant, and the liability of the administrator or guardian in respect thereto, are specifically and definitively established, sustains what we now hold. See *Bank of Orange County v. Kidder et al.*, 20 Vt. 519; *Probate Court v. Slason et al.*, 23 Vt. 306; *Probate Court v. Chapin et als.*, 31 Vt. 373.

The discontinuance resulting from the failure to procure the affirmance of the allowance of the claim by the commissioners in this case, operates upon the whole proceeding, and leaves the parties standing just as if the claim had not been presented and allowed; and of course, as the bond given was but an incident of the appeal taken, when the appeal went for nought by reason of the discontinuance, the bond went with it, leaving no ground for recovering nominal damages.

It seems to us that very little weight should be given to the argument arising from the jeopardy the appellee may be in of not knowing that an appeal has been taken, unless he should be notified as provided in the statute. We are aware that the proceedings of the law leave this matter of appeal with a pretty

loose margin; inasmuch as there is no provision limiting or fixing the time for the return of the commissioner's report, nor for notice to be given of the return of such report. But, nevertheless, the records and files of the probate court are always open to inspection, and the terms of the county court are fixed by public statutes. Any person interested in a contested claim may therefore inform himself on the subject of such claim, whether it has been allowed, and if so, whether an appeal has been taken, seasonably to protect himself in respect thereto, by pursuing the steps prescribed by the statute. Inasmuch as it is known that the appellant may drop his appeal at any time after it has been taken, without giving the required notice of the taking of such appeal, and inasmuch as the statute prescribes the mode by which the vacated allowance may be restored and established, it leaves the appellee charged with the duty of giving such attention to the course of the case in the established courts as will enable him to avail himself of the provisions of the law for the perfecting of his claim, and of his right to damages and costs occasioned by the appeal.

In case the probate court should prescribe the notice to be given to the appellee, for instance twelve days before the then next term of the appellate court, the appellant certainly would not be bound for any purpose to serve the notice before the prescribed time. And it would hardly do to say that he might not abandon his purpose of carrying on the appeal before that time should be put. In such case there would be no duty under the statute to give notice either of the appeal, or its abandonment.

The rule and reason in *Low v. Estes*, 6 Vt. 266, seem to apply with as much force to the present case as to that.

The judgment is affirmed.

 Roberts et als. v. Hall.

THOMAS ROBERTS, SOLON J. Y. VAIL, STEPHEN STEVENS, AND
 WILLIAM SIAS v. EMERSON HALL.

Trust. Attachment.

S. devised a farm with the stock and tools thereon to the plaintiffs in trust for G. and his wife and children, during the life of G. and his wife, and at their decease to be divided equally between their children, with authority to the plaintiffs to permit G. to have the management of the trust property so long as from his habits of industry, frugality, &c., they should think it safe and prudent to do so.

Held, that though it was competent for the plaintiffs, by some positive act indicating such an intention, to surrender the control of this property to G. whenever they saw fit, so as to vest in him the absolute ownership of it, yet the mere fact that he was suffered by the plaintiffs to live upon and carry on the farm, and to manage and take care of the stock, and to appropriate the avails of the same for the support of himself and family, was not an act of that character, and that even the stock raised by G. from the original stock so devised to the plaintiffs and taken care of by him, could not be attached and held upon his debts.

Held, also, that the fact that the value of the property had been enhanced by the labor of G. would not give him a separable or attachable interest in any specific article.

The case of *Trask v. Donoghue*, 1 Aik. 370, questioned.

TROVER for a colt, one yearling and two two-years-old cattle, and one lamb. The defendant pleaded the general issue accompanied with notice that he should defend the action on the ground that he, as deputy sheriff, attached the property in question as the property of one George E. Sias upon writs against him in favor of his creditors, and afterwards sold it upon executions issued upon judgments rendered in said suits, and that the same actually was, when the defendant took it, subject to attachment upon his, George E. Sias', debts. The cause was tried by the court at the December Term, 1860, in Caledonia county, POLAND, CH. J., presiding.

The following facts appeared on trial :

In 1850 Judge Samuel Sias, being the owner of a farm in Danville with the stock and farming tools thereon, put his grandson, the above mentioned George E. Sias, upon the farm, designing thereby to enable him to get a living for himself and family, the said George being destitute of property and rather

shiftless and improvident. George E. Sias continued to live upon this farm and to carry on the same, and apply the products and avails to the support of himself and family without any particular contract with Judge Sias, until November 2nd, 1857, when a written contract was made between them, that if George should in a husbandlike manner carry on the farm for Judge Sias, he should receive for his compensation for his labor each year the use of the buildings thereon for his family to live in, and also pasturing and keeping for a specified number of cattle, and also a stipulated quantity of produce and fire wood per year ; also that George should pay the taxes assessed upon the farm each year, and that all the remaining products of the farm should belong to Judge Sias to be disposed of as he should see fit, and that George should surrender the farm to Judge Sias whenever requested. George continued to occupy the farm under this contract until December, 1857, when Judge Sias died, leaving a will by which he devised unto the plaintiffs this farm and all the stock, farming tools, and other articles thereon, in trust for the said George E. Sias, his wife and children, to be by them held in trust during the natural life of the said George and his wife, and at their decease to be equally divided between their children. The will also contained the following provision in respect to the property so devised to the plaintiffs: " Said trustees are hereby authorized to permit the said George E. Sias to have the management and control of said trust property, at any time and so long, as, from his habits for industry, frugality, temperance, economy and strict attention to his home and family, they shall think it safe and prudent to do so. Said trustees are hereby authorized and empowered to sell and transfer said real estate or any part thereof," with provisions for the mode of investing the proceeds of such sales.

After the death of Judge Sias his executors surrendered to the plaintiffs the property devised by this will to them, and they have ever since had the general charge thereof, but the said George E. Sias has continued to live upon and carry on the farm, take care of the stock and have all the avails thereof for the support of his family, as before Judge Sias' death. The plaintiff Roberts, who was the active trustee under the will,

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sometimes sold some of the stock and the products of the farm, and paid out the same for and to George E. Sias as the necessities of himself and family required ; and sometimes George was specially authorized by Roberts to sell some of the products of the farm, and himself received and expended the money. He had no general authority from the plaintiffs to sell any of the products of the farm, but he did so occasionally without their knowledge. It did not appear that the plaintiffs took any control or supervision of the manner of carrying on the farm, but George E. Sias managed it to suit himself, doing or procuring to be done all the labor on the farm, and managed the farm and stock in the same way as if he were the owner thereof. The only control of the personal property upon it, taken by the plaintiffs, was in disposing of it, and preventing the disposal of it by him. George had all the avails and proceeds of the farm and stock for the benefit and support of himself and family, and no account was kept between the plaintiffs and him of the products of the farm except such as they received and disposed of. The stock attached by the defendant was all raised from the stock on the farm at the time of Judge Sias' death, devised to the plaintiffs in trust as above mentioned, and was all raised there by George and taken care of by him until the attachment. This attachment was made upon debts due from him and contracted while thus living on the farm.

Upon these facts the county court decided that the plaintiffs were the lawful owners of the property, and that the same was not subject to be attached on the debts of George E. Sias, and rendered judgment for the plaintiffs, to which the defendant excepted.

J. Ross, for the defendant.

Bliss N. Davis, for the plaintiffs.

KELLOGG, J. This is an action of trover for a colt, one yearling and two two-years-old cattle, and one lamb, attached by the defendant as an officer on writs in his hands against one George E. Sias, and subsequently sold on the executions issued on the judgments rendered against said George in said suits.

The question for decision is, whether, on the facts appearing in the case, the property in question legally belonged to the said George, so that it was subject to attachment on his debts, at the time of the conversion complained of.

It appears that this stock was raised on a farm in Danville which was owned by Judge Samuel Sias, the grandfather of said George; and there can be no doubt that Judge Sias, under the contract between him and George, was the legal owner of the stock and other property on the farm at the time of his decease in December, 1857. By his will, which was duly proved, he devised and bequeathed to the plaintiffs the said farm, stock, and other property to be by them held in trust for the said George and his wife and children during the natural life of the said George and his wife, and, at their decease, to be divided equally between their children, with authority to permit the said George "to have the management and control of said trust property at any time, and so long, as from his habits for industry, frugality, temperance, economy, and strict attention to his home and family, they should think it safe and prudent so to do." It also appears that George had lived on said farm for several years previous to the decease of his grandfather, and that he was destitute of property, and somewhat shiftless and improvident; and the purpose of this testamentary provision manifestly was to keep the title of this property in the hands of the trustees, leaving it to their discretion how far and when to trust George with it. The property which was attached by the defendant was all raised from stock on the farm at the time of the testator's death, and the legal title to it passed to the plaintiffs as trustees under the provisions of his will. The said George comes into his connection with this property only through these trustees, and he is one, but not the only one, of the *cestuis que trust* for whose benefit the testator made this provision.

It is claimed on the part of the defendant that the trustees having suffered the property to remain in the possession and under the control and management of George, the trust became so far executed as to divest them of their legal title to the property, and to make the products of the farm and the increase and growth of the stock his absolute property. It was undoubtedly

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competent for the trustees to surrender the control of this property to him whenever they saw fit, so as to vest in him the ownership as well as the temporary possession and management of it; but without some positive act indicating an intention on their part to do this, the legal title to the property should be considered as remaining in the trustees. The mere fact that he was suffered by the trustees to live upon and carry on the farm, and to manage and take care of the stock, and to appropriate the avails of the same for the support of himself and his family, is not, in our opinion, an act of that character; as such use, management, and appropriation of the property by him under the oversight and control of the trustees is the precise object which the testator had in view when he made this provision in his will. The county court have found that after the property passed into the hands of the trustees, they took, and since have had, the general charge and supervision of it, and we find nothing in the case to show that they ever parted with their legal title to it. It is claimed by the defendant that the value of the property has been enhanced by the labor of George, but this, if true, would give to him no separable interest in any specific article of the property, although it might furnish ground for an equitable claim, on the part of his creditors and become the proper subject of an accounting in a court of equity. But there is nothing in the facts found in this case which shows that the labor which George expended in the care and management of the property was worth any more than the amount of the avails of the property received by him or appropriated to the support of himself and his family; and, unless this did appear, there would be no ground for any equitable claim to the property on the part of his creditors. We are satisfied that the facts, as found by the county court, will not justify the conclusion that the trust property was ever so severed or surrendered by the trustees to him as to transfer to him the legal title to the property.

The case of *Trask v. Donoghue*, 1 Aik. 370, is cited by the defendant as an authority which is decisive in favor of his defence in this suit. In that case, it was held that if real and personal estate be devised to trustees to the use of a *cestui que trust* during his life, and the trustees put him in possession and

suffer him to occupy the same without account, the products of such estate may be attached by his creditors. In that case, there was but a single *cestui que trust*, and in this respect it is unlike the present case; but we think that the ground of that decision may justly be questioned. It is stated by HUTCHINSON, J., interrogatively, in these words: "Can one be *cestui que trust* of personal property not exempt by law from attachment, and have the sole visible possession of that property, and add much to its value by his own industry, which, but for this stratagem, might produce some other property for his creditors,—and can he hold this property to the exclusion of his honest creditors? The court are of opinion that he cannot." The point of the decision seems to be that such a possession of the trust property by the *cestui que trust* is in itself a fraud in law upon his creditors, if he bestows any labor upon it, or in the care of it, because, but for this, his industry might produce some other property for them. There would seem to be equal force in the proposition that the trust itself would be a fraud in law, on the ground that by making any provision whatever for the support of the *cestui que trust*, he would, to the extent of such provision, be relieved from the ordinary incitements to industry, and more especially so in a case in which the provision was ample enough to enable him to live without labor. But perhaps, if the *cestui que trust* was so entirely helpless as to be unable to labor, such a case would not come within the reason or spirit of this decision. The fraud of such a possession of the trust property by the *cestui que trust*, as to his creditors, would, in the light of this decision, rest not upon the possession itself nor upon any fact existing at its commencement, but upon the possession coupled with the fact that the labor of the trustee had added something to the value of the trust property. This is the only ground upon which the creditor could seek to pursue the trust property on a debt against the *cestui que trust*, and, in our opinion, the claim of the creditor to be allowed the benefit of the increased value of the trust property in satisfaction of his debt in such a case would be one cognizable in a court of equity and not in a court of law.

The judgment of the county court in favor of the plaintiffs is affirmed.

Watts v. Kavanagh, and Trustee.

ISAAC WATTS v. MICHAEL KAVANAGH, AND TRUSTEE, H. MERRILL.

*Statute of Limitations. Trustee Process. Principal and Agent.
Book Account. Costs.*

The fact that a debtor, who has been absent from the state more than six years, has had during that time, within the knowledge of the creditor, funds in the hands of a third person liable to be reached by the trustee process, will not bring the case within the operation of the statute of limitations, if the debt does not exceed ten dollars.

Quere, whether it would have that effect if the debt did exceed ten dollars.

Though in certain cases of long continued agency, notice of the revocation thereof is necessary to prevent the principal from being liable for the acts of the agent after his agency has been revoked, to those who contract with him in good faith upon the credit of his principal, yet this rule does not apply to cases where the agent had only a special authority to do a particular act or make a particular contract.

In book account the county court has a discretionary power to deny full costs to the plaintiff if he fails to sustain his whole claim.

BOOK ACCOUNT. The facts in the case are sufficiently stated in the opinion of the court.

M. Hale, and Wing, Lund & Tayler, for the plaintiff.

Bliss N. Davis, for the defendant.

PECK, J. This is an action on book, tried in the county court on a special report of the auditor. The plaintiff's account on which the questions arise, consists of items numbered from 1 to 168. The defendant presented no account, and the plaintiff's account contains no credits, and no payments appear to have been made by the defendant.

The county court decided that the plaintiff was entitled to recover the item of \$1.75 only, being item No. 7. To this decision the plaintiff excepts and claims to recover the whole 168 items.

As to the first six items the auditor finds that they are for articles delivered to the defendant before he left the country, and

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as to the 7th item he finds that the plaintiff before the defendant left agreed to pay that sum, \$1.75, for the defendant, but that he did not pay it till November 24th, 1852; so that this item did not accrue until November 24th, 1852. It appears that the defendant left the state and went to California in October, 1851, and has never returned. By reference to the account it appears that the first six items accrued between February 3rd, 1851, and October, 1851, when the defendant left the state. The only objection to these items is the statute of limitations, which is also relied on as to the seventh item. The action was commenced as appears by the writ November 19th, 1857, so that as to the seventh item the action was commenced within six years from the time it accrued, as it must be taken to have accrued at the time the plaintiff paid that sum for the defendant, and not at the time he agreed to pay it. As to the first six items the action was commenced more than six years after the items accrued. It is claimed by the plaintiff that the absence of the defendant from the state saves the six items from the operation of the statute; and by the defendant that he had known property within the state during his absence and residence out of the state, which might have been attached, and that therefore they are barred.

On this point the auditor reports that when the defendant left for California he left in Merrill's hands (who lived in this state a mile from the plaintiff) \$300 or \$400 to be by him taken care of, and that the rest of his property he took with him; that after he got to California he sent to Merrill about \$1000 more from time to time, the last being in 1853, to be by him managed, and that these funds Merrill kept loaned out, and that this was known to the plaintiff during the defendant's absence.

Were these funds thus situated "known property" "which could by the common and ordinary process of law be attached," within the meaning of the statute? These funds were not such unless the trustee process is "the common and ordinary process of law" within the meaning of the statute, which in this case it is unnecessary to decide; for conceding that such process is within the meaning of the statute, the plaintiff's claim did not amount to \$10 until the seventh item accrued, which was within six years next before the suit was commenced; so that these six

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items until then could not have been recovered or collected by trustee process. In order to collect a debt by trustee process the plaintiff's debt and the effects or credits in the possession of the trustee must each exceed the sum of \$10. This is so provided by the 72nd section of the trustee Act, (Comp Stat. p. 265.) This fund, in order to bring the case within that provision of the statute of limitations, must be such as could have been attached on this debt. It being exempt from attachment on this debt by reason of the plaintiff's debt being under \$10, it is the same in effect as if it had been exempt by reason of the fund in the possession of the trustee being less than \$10, and could have no more effect to cause the statute of limitation to run against the claim than would the defendant's wearing apparel, his only cow, or any other property exempt by law from attachment and levy of execution.

The plaintiff is therefore entitled to recover the first six items of his account, together with the seventh item.

The residue of the items claimed by the plaintiff were furnished by the plaintiff to the defendant's minor daughter, Ann, during that portion of the time she lived in the plaintiff's family, between August, 1852, when the plaintiff's wife died, and February, 1856, when Ann ceased to reside in the plaintiff's family, she having gone to reside in his family in 1849, when about nine years old and resided there till 1856, laboring in the family, going to school as children of her age usually do, being clothed and boarded by the plaintiff as one of his own children. The auditor also finds that up to August, 1852, when the plaintiff commenced charging for what he furnished, there was no expectation of any charge or payment on either side, and that the plaintiff made no claim on trial for anything furnished prior to that time. Nothing need be said of the last four items which are for board, and are disallowed by the auditor, as the auditor finds as to these items that Ann's labor was a fair equivalent for her board. The one hundred sixty-eight items (except the first seven,) are allowed by the auditor subject to the opinion of the court upon the facts reported. It appears that in August, 1852, the plaintiff concluded not to keep Ann any longer under that arrangement, and commenced

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charging without any new contract with the defendant or with any one authorized to act for him, and without giving any notice to the plaintiff of his change of purpose, or to Merrill the plaintiff's agent, or to Ann till after she left his family in 1856. Whether the original contract was as the defendant claimed, that the plaintiff adopted the child as his own till she should become eighteen years old, or as the plaintiff claimed, "that there was no binding agreement for her to stay or for him to keep her longer than it should suit the plaintiff and Ann," some such notice was necessary to entitle the plaintiff to charge for her support. The report shows that the defendant remained in California till sometime in 1853, writing home frequently to Merrill and to his children, when he left and went to Australia, and that the plaintiff took no pains to learn the defendant's residence in California; that Merrill was the general agent of the defendant, and that he was guardian of this child from February, 1852; but it appears that the plaintiff did not know he was her guardian. Merrill it appears all this time supposed that Ann was living in the plaintiff's family under the original contract.

But it is claimed the notice the plaintiff gave to Mrs. Blanchard in August, 1852, and what she said to him on that occasion, gave him a right to make these charges. The auditor finds that Mrs. Blanchard, who was an aunt of this child, (the mother of the child having then recently deceased and the defendant's family being broken up,) made the original arrangement with the plaintiff, or his wife by his consent and authority, in relation to the child living in the plaintiff's family; that this was without any special authority from the defendant, but that the defendant soon after, and while he resided in Peacham where the plaintiff resided, consented to it. In August, 1852, the plaintiff gave Mrs. Blanchard notice that he did not wish to keep the child any longer, and that she said he had better keep her till her father came in the fall or winter, and that he would then find a place for her; that her father would have to pay some one, and he might as well pay him as any one. But the auditor finds she had no authority or agency from the defendant after she made the original arrangement with the plaintiff. The plaintiff's counsel claim that the defendant is bound by this act of Mrs.

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Blanchard on the ground that the plaintiff had a right to presume her agency continued till he had notice to the contrary. There are cases of a long continued agency where notice of a revocation of the agency is necessary, and where without such notice there remains such an apparent agency after the revocation, as will bind the principal by the subsequent acts of the agent as to one who *bona fide* contracts with him on the faith of his agency. But this principle does not apply to a case like the present, where the supposed agent at most had originally only a special authority to do a particular act or make a particular contract. The plaintiff was not warranted in relying on her agency three years after she made the original contract, and this, too, without any inquiry as to her authority; nor does it sufficiently appear that she in this instance, in August, 1852, assumed to act as the agent of the defendant, or that the plaintiff relied on what she said as being said in that capacity. These items must be disallowed.

This disposes of the plaintiff's exceptions. The defendant excepted to the decision of the county court in allowing full costs to the plaintiff and refusing costs to the defendant, as the plaintiff failed to recover on a portion of his account. It is claimed by the plaintiff that the act of 1856 relating to the apportionment of costs, does not apply to this case. We are not prepared to say that that statute does not apply to an action on book, and we think without that statute the county court has a discretionary power to apportion the costs at least so far as to deny full costs to the plaintiff. It does not appear, however, that the county court in overruling the defendant's motion to apportion costs, put the decision on the ground of a want of power, and in the absence of any statement of facts or grounds on which this decision of the county court was made, this exception must be overruled.

Judgment reversed, and judgment for the plaintiff for the first seven items in his account and interest thereon with costs.

Dennison et als. v. Powers.

LUCIUS DENNISON AND OTHERS v. DAVID POWERS.

New Trial. Practice. Jury.

A jury having settled their minds as to the rights of the parties, but being in doubt as to the proper mode of making a computation of what was due the successful party, called the county clerk into their room and inquired of, and were correctly informed by, him, how the computation should be made, and rendered a verdict accordingly. *Held*, that this course, though an irregularity, would not warrant the court in setting aside the verdict.

PETITION FOR A NEW TRIAL. The facts are stated in the opinion of the court.

E. A. Cahoon and T. Bartlett, for the petitioner.

Peck & Colby, for the petitionee.

BARRETT, J. The calling of the clerk into the jury room, as was done in this case, was an irregularity that should not have occurred; but nothing improper was intended by it either by the jury or the clerk. The parties and their counsel had no connection with it. It was a matter solely between the jury and the clerk. The jury had settled their minds as to the rights of the parties, but were in doubt as to the proper mode of making a computation of what was due upon the execution. The clerk, in reply to inquiry, told the jury how the computation should be made, and told them correctly. Hence no error or injury has resulted. The matter then rests in a mere irregularity without the fault of either of the parties.

The current of decision both within and without this state is now almost uniform, that the courts will not visit the consequences of such an irregularity upon an unoffending party, where it has wrought no prejudice or injury to the other party. Such is the uniform ruling in the county courts, for several years, upon motions to set aside verdicts for such causes, and meets the approbation of judges where cases of the kind arise in this court.

On the whole, the court are unanimous in holding that the petition in this case be dismissed, with costs to the petitionee.

Strong et al. v. Slicer.

J. A. & J. W. STRONG v. ALEXANDER SLICER.

Evidence.

Evidence that after the plaintiff's claim accrued he paid a claim of the defendant against him without any effort or proposition to apply it upon his debt against him, is admissible as tending to disprove the existence of the plaintiff's claim.

Where a long time has elapsed since a claim accrued, evidence is admissible upon the part of the defendant to show that during that time the plaintiff was in such pecuniary condition as to make it especially burdensome for him to go unpaid, and also to prove that during the same time the defendant possessed the means of paying the debt, if called upon.

But it would not be competent for the defendant to prove that he was prompt and punctual in the payment of his debts.

ASSUMPSIT on the common counts. Plea, the general issue. Trial by jury at the May Term, 1861, in Lamoille county, ALDIS, J., presiding.

The account of the plaintiffs for which the suit was brought, consisted of about twenty items, and began in 1850. The plaintiffs were partners in managing and carrying on a farm and its stock, from 1849 to the time this suit was begun. The defendant, a neighbor of the plaintiffs, was not able to read or write,—hence kept no accounts, and was in the habit of frequently settling up and squaring his dealings with his neighbors, and was able to pay, and prompt and punctual in paying his debts.

It was admitted in the case that the plaintiffs and the defendant from 1849 to the time this suit was brought, had dealings with each other from time to time, and throughout the whole period; small dealings and debts arising between them, such as farmers and neighbors are accustomed to have with each other; and that from time to time they settled and evened off such their dealings.

The plaintiffs claimed and their evidence tended to show that the items of their account were for matters which were charged on book, and had never been settled, paid for, or evened off in

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the dealings and settlements of the parties ; but were still due and unpaid ; that \$3.00 or \$4.00 had been due since 1851, and over \$20 since 1855. The defendant claimed, and his evidence tended to show, that he and the plaintiffs had had dealings and that they were in the habit of getting together and settling all their deal, and that at such times they settled and evened off all their deal so as to be square with each other, and that all the items in the plaintiff's account had been so settled and evened off. The defendant's evidence also tended to show that the plaintiffs were poor and in need of the payment of all that was due to them, and that the defendant was able always to pay his debts and was prompt in the payment of them ; and that the plaintiffs never called on the defendant for payment of such items, or claimed of him that they were due, or that any balance was due to them, until about the time this suit was brought, and not till after he had been paid the amount of his judgment against Jasper Strong for what he (defendant) had had to pay Meigs as hereinafter stated. The defendant offered testimony tending to show that one Meigs, the fall before this suit was brought, sued Jasper W. Strong, one of the plaintiffs, for the service of a stallion to a mare belonging to the plaintiffs, and which was a part of the stock which they kept on their farm ; that Meigs attached personal property and that Jasper Strong got the defendant to receipt it ; that Meigs got judgment against Jasper W. Strong, and then sued the defendant on the receipt ; and that the defendant, as such receiptor, was obliged to pay the amount of the Meigs judgment. The plaintiffs' evidence tended to show that the debt to Meigs was the sole debt of Jasper W. Strong, and not a debt in substance against them as partners. The defendant's evidence tended to show that the debt to Meigs was only in name the debt of Jasper Strong, but was in fact a debt due from the plaintiffs as partners in carrying on their farm and its stock. In this connection the defendant offered to show, that in the fall or winter after he had, as receiptor, been obliged to pay the amount of Meigs' judgment against Jasper W. Strong, (about \$10,) and before this suit was brought, and when, as would appear by the plaintiffs' claim in this suit, there was, and had been for about

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three years, a balance of over \$20.00 due from the defendant to the plaintiffs, Jasper, one of the plaintiffs, called on the defendant and paid him \$3.00 towards the amount he had so paid Dr. Meigs, and told him (defendant) that he wanted him to take a piece of cloth for the balance so paid to Meigs; that the defendant said he had paid out the money and that he must have the money; that Jasper replied that it was an honest debt and he would pay it; and that he subsequently sued Jasper for it and he paid the amount; and that at no time did Jasper make any claim that the defendant owed the plaintiffs anything, or claim anything for the items of the account now claimed to be due. The plaintiffs objected to this testimony on the ground that the debt to Meigs was Jasper's alone, and that the other plaintiff had nothing whatever to do with it, or with the transactions growing out of it. The court admitted it upon the ground, and so instructed the jury, that if the debt to Meigs was really a partnership debt due from the plaintiffs and not the private debt of Jasper, and the plaintiffs so understood it, and the defendant paid it, and that afterwards when the defendant insisted on payment of it in money, no claim was made by Jasper that the defendant owed them anything, or that the balances, (which they now claim had then been due several years and were more than sufficient to offset it) should be applied upon it, but admitted it as an honest debt and should be paid, such conduct and omission by Jasper was evidence to be weighed by the jury as tending to show that such balances were not justly due; but if the jury were satisfied that the debt to Meigs was merely a private debt of Jasper and not of the plaintiffs as partners, then such conduct and omission of Jasper would not be any evidence that the balances were not justly due.

To the admission of this testimony for the purpose and in the connection above stated the plaintiffs excepted.

The evidence offered by the defendant as hereinbefore set forth to show that he was able, and prompt and punctual in payment of his debts, (in connection with the other evidence,) was objected to by the plaintiffs but admitted by the court, to which the plaintiffs excepted.

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T. Glead, for the plaintiffs.

Child & Benton, for the defendant.

POLAND, CH. J. The evidence of the defendant in relation to the Meigs debt, and the negotiation between the defendant and one of the plaintiffs, for the settlement of it, was properly admitted. If the defendant was at that time justly indebted to the plaintiffs, in a greater amount than the defendant had paid them, it was singular that the plaintiffs should promise to pay it, and endeavor to have the defendant take his pay in cloth, and allow him to sue and collect it, without making some effort or proposition to apply it upon their debt against the defendant. The fact that they did not certainly affords some ground to doubt whether the plaintiffs had then such a debt existing against the defendant as they claimed. The evidence given by the defendant of the pecuniary condition of the plaintiffs and himself during the period that the plaintiffs's debt had existed, was also properly admitted. Some portion of the plaintiffs' claim had been due for a long period of time, and where a debt has been allowed to run for an unusual and unreasonable length of time, this alone furnishes some ground of suspicion against it, though lapse of time alone, short of the statute of limitations, is not sufficient ground from which to presume payment or extinguishment. In such cases, however, it is always admissible to prove that the plaintiff has been in such pecuniary condition as to make it especially inconvenient and burdensome for him to go unpaid, and also to prove that the defendant has all along possessed the means of paying if called upon, with or without suit. Such evidence adds to the improbability that the plaintiff would have so long delayed calling for payment, if he had a just debt, and casts additional doubt upon the validity of the claim. This species of evidence we believe has always been allowed when the debt sought to be recovered has run for an unusual length of time; it is rather in aid of the presumption from lapse of time.

The defendant was also allowed to prove, against the objection of the plaintiffs, that he was a man prompt and punctual in the payment of his debts. This we think was error. If such

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evidence could be admitted to aid a defence of payment, then it must always be equally admissible for a plaintiff, in answer to a defence of payment, to prove that the defendant is a slack, careless or negligent man, not usually a punctual paymaster. If the character of the defendant for promptness and punctuality in paying debts, or the opposite, be admissible, we see no reason why his character for honesty or piety, or the opposite of either, should not be, as affording some aid in determining whether he had, or had not, probably fulfilled his obligation. Such evidence is too remote and fanciful to be received as legal testimony. In civil cases evidence as to the general character of the parties, is not ordinarily admissible, except in cases where the issue itself is one involving character, as actions of slander and the like. For this error the judgment is reversed, and the case remanded for a new trial.

SARAH G. WILLIS, *Administrator of the Estate of* CYRUS WILLIS,
deceased, v. ORVILLE E. FREEMAN AND OTHERS.

Partnership.

If land be bought with partnership money, and used for the partnership benefit, and the deed be taken to the partners jointly, it will be treated as partnership property, though the grantees are not described in the deed as partners.

A creditor of one member of a partnership cannot attach and hold the interest of such partner in any article of the partnership property, unless enough is left to satisfy the creditors of the firm, and if the partnership be insolvent, the partnership creditors have a right to have the partnership property applied to the payment of their debts.

But if, at the time of the attachment of the individual partner's interest in the property the firm is not insolvent, their subsequent insolvency, even before judgment is obtained against the individual partner, will furnish no ground for preferring partnership debts to the lien acquired by such attachment.

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BILL IN CHANCERY. The facts in the case are sufficiently stated in the opinion of the court. The chancellor dismissed the orator's bill, from which decree the orator appealed.

Benton & Ray, for the orator.

———, for the defendants.

POLAND, CH. J. Abbot & Lindsay were partners in the business of hotel keeping, staging, keeping livery stable, &c., at Lancaster, N. H., from 1850 to 1859.

On the 27th day of September, 1856, they purchased a farm partly in Guildhall, and partly in Lunenburg, Vermont, for the price of five hundred dollars, and took a conveyance of the same to themselves jointly, but they were not described in the deed as partners. But from the evidence in the case we are satisfied that the land was paid for with company funds, and was occupied and used for the partnership benefit, so that the same was really partnership property, and should be so regarded, even in a controversy between partnership and private creditors for priority.

The defendant, Freeman, a private creditor of Lindsay, on the 30th of December, 1857, commenced a suit upon his debt and attached an undivided half of said land, as the property of Lindsay. He recovered judgment against Lindsay at the September Term of the Essex county court, 1858, and on the 28th day of December, 1858, duly set off one undivided half of said farm in part satisfaction of his execution. The orator's intestate was a creditor of the firm, and commenced a suit on his debt, and attached said farm on the 6th of September, 1858, as the property of the firm.

The orator's intestate recovered a judgment, at the September Term of the Essex county court, 1858, took out his execution, and on the 11th day of November, 1858, caused a set off of said farm to be made to satisfy his execution.

Abbott & Lindsay failed in the fall of 1858, but the case furnishes no evidence but that when the defendant Freeman made his attachment in 1857, they were entirely solvent.

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Various other matters have been introduced in evidence, but as the decision of the case does not make them material the above statement is sufficient. The orator's bill is brought for the purpose of enjoining the defendant, Freeman, from taking possession of the one undivided half of the farm set off on his execution, and from setting up any title under his levy, as against the orator.

It is now well settled, that a creditor of one member of a partnership cannot take the interest of such partner in any article of the partnership property, unless enough is left to satisfy the creditors of the firm, and if the partnership be insolvent, the partnership creditors have the right to have the partnership property applied to the payment of their debts.

The right of the defendant Freeman must be determined by the state of things in 1857, when he made his attachment. There is no evidence but that, at that time, Abbott & Lindsay had ample property, aside from this farm, to pay all their firm debts. The defendant had therefore a right to attach the interest of Lindsay in the farm, and appropriate it to the payment of his debt, and having thus rightfully acquired a *lien* upon the land by his attachment, it could not be divested by the subsequent insolvency of the partnership.

This principle seems to be settled in the following cases: *Washburn et al. v. Bank of Bellows Falls et al.*, 19 Vt. 278; *Russ, administrator of Barrow v. Fay*, 29 Vt. 381. Upon this ground, we all agree that the decree of the chancellor dismissing the orator's bill must be affirmed.

Cardell v. Ryder et als.

RACHEL M. CARDELL v. GEORGE W. RYDER, ALVIN MCINTYRE
AND JEPHTHA HOWARD.

[IN CHANCERY.]

*Separate Property of Married Woman. Chancery. Husband and
Wife.*

An agreement made during coverture between husband and wife that certain personal property or funds belonging to him shall become her separate property, will be enforced in equity, if it is so far carried into effect as to separate the property or fund from the residue of the husband's estate, and place it in the name and exclusive control of the wife.

BILL IN CHANCERY. The facts in this case appear sufficiently in the opinion of the court. The chancellor, at the January Term, 1861, in Orange county, *pro forma*, dismissed the bill, from which decree the oratrix appealed.

P. T. Washburn, for the oratrix.

P. Perrin and C. W. Clarke, for the defendants.

PECK, J. This is a bill to foreclose a mortgage executed by the defendant McIntyre and others to the defendant George W. Ryder, the mortgagors having sold and conveyed the premises to the defendant Howard since the date of the mortgage. So far as it relates to the defendants McIntyre and Howard, the bill is substantially a bill to foreclose the mortgage. The defendant Ryder is made a party on the ground that he denies the right of the oratrix to the notes and mortgage, and has a bill pending to foreclose the mortgage in his own name and for his own use and benefit, commenced before the commencement of this suit. The only question is whether the oratrix, or the defendant Ryder, has the better equitable right to the notes and mortgage.

It appears that the oratrix was married to the defendant Ryder in 1842, and that at the March Term of the Supreme Court in Orange county 1855 she, on her petition, obtained a bill of divorce.

The oratrix in her bill and proofs claims title to the notes and mortgage on two grounds ; first, that she had at the time of her

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marriage with Ryder about two hundred dollars, and also some other little personal property, and that it was agreed and always understood between her and Ryder that that fund should be held by her or secured to her for her separate use, and that when the premises in question were bought by them in 1849 this went in part payment, and when the premises were sold in 1852 for \$1,000 or \$1050 to Mr. McIntyre, and these notes and this mortgage taken for \$377 of the price, it was agreed she should have them as her separate property, and that they were then delivered to her for that purpose, and that she has kept them ever since; secondly, she claims that when the bill of divorce was granted she had a petition for alimony pending, and that it was agreed that she should have these notes and mortgage, and certain other property in her possession, in full of her claim for alimony, and that the petition for alimony was thereupon by agreement withdrawn.

We find that she had such property at the time of her marriage, and that it was applied towards the payment of this farm when Ryder bought it, and that when it was sold it was agreed between her and Ryder that she should have the notes and mortgage in question, and that the notes when executed were delivered directly to the oratrix for that purpose by the consent and agreement of Ryder. We further find that there was such agreement and understanding between them that her property should be kept separate or be secured to her ultimate use, and that it was so kept separate a portion of the time prior to Ryder's purchase of this farm. At one time it appears it existed in promissory notes against one Ruggles payable to the oratrix. It is true that when Ruggles paid the money it went into the hands of Ryder, but at about the same time he executed a note payable to Ruggles for the use and benefit of the oratrix, and exhibited it to Ruggles; and whether that note was delivered to the oratrix and kept by her till it was lost or taken from her without her knowledge or consent by Ryder, as her evidence tends to prove, or whether it was retained by Ryder as he claims in his testimony, and executed, as he claims, to entitle his wife to that amount out of his estate in case she survived him, it is evidence of a recognition on his part of some understanding that

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her property should be preserved in some form to her use. But it is claimed by the defendants' counsel that this agreement in relation to her separate property does not support any allegation in the bill. But it is alleged substantially that she had such property, that it was appropriated to the purchase of this farm, and that in consideration of this and that she would sign the deed, it was agreed at the time the farm was sold by Ryder, that she should have these notes, and that they were then delivered to her in pursuance of that agreement. The allegations of the bill are sufficient to let in this proof as evidence, if not as a distinct ground of relief. It is evidence confirming the direct evidence as to the agreement made at the time the notes in question were given.

It is not necessary to show an *ante-nuptial* agreement. An agreement made during coverture may be enforced in equity even in case of a gift from the husband to the wife, if it is so far carried into effect as to separate the property from the residue of the husband's estate and place it in the name or exclusive control of the wife. Nor is it material, except as matter of evidence, that the funds of the oratrix have at times passed into the hands of her husband and become mingled with his property, since by the agreement made at the time these notes were executed, perfected by a delivery of the notes to her, her property became again separated. We think upon this ground, if there was nothing further in the case, the equitable right of the oratrix to the notes is made out.

The plaintiff claims, and attempts to show, that by the agreement for alimony she was to have these notes and mortgage, and all the other notes and property in her possession. The defendant concedes, and the proof shows, that she was to have \$400, and Mr. Perrin testified, (and thus far we can safely find,) that the agreement was that the \$400 was to be paid in cash or notes; but the defendant insists that no particular notes were specified. Taking this to be the contract as the defendant claims it, since the \$400 has not been paid, nor any subsequent agreement entered into specifying any particular notes she shall take, there is nothing in this contract that is inconsistent with the oratrix's right to enforce her pre-existing equity in these

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notes and mortgage derived from the agreement and delivery to her at the time of their execution. Nor do we find any such tender of performance by Ryder of this contract in relation to alimony, and breach on the part of the oratrix, as to defeat her right which she previously acquired to the notes and mortgage in question, even assuming, as is claimed by Ryder, that on the payment of the \$400 she was to give up all the notes in her possession; especially as by allowing her to hold and appropriate to her own use the notes in suit, it satisfies so much of the \$400; for it is not claimed, nor is such the fact, that she was to have the \$400 in addition to these notes and mortgage.

Whether the evidence would warrant us in finding that the agreement in relation to alimony was as stated in Mr. Perrin's letter of April 11th, 1856, that is, that she was to have \$400 *out of the notes in her hands*, they giving her a lien on these notes by that agreement on which to rest the claim of the oratrix, it is not necessary to say, since it is sufficient that there is nothing in that agreement to deprive the oratrix of her original equity and title to these notes.

The decree of the court of chancery, which was a *pro forma* decree dismissing the bill, is reversed, and a decree is to be entered for the oratrix to the effect that the notes and mortgage on which the bill is founded are her sole property, free from all claim on the part of the defendant Ryder; that the oratrix have a decree of foreclosure against the other defendants without costs, and as to Ryder, a decree against him for her costs; and that he be perpetually enjoined from further prosecuting his bill in chancery on said notes and mortgage, or in any way collecting or attempting to collect the same, and that his said bill of foreclosure pending in the court of chancery be discontinued with costs.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CHITTENDEN,

AT THE

JANUARY TERM, 1862.

PRESENT:

**HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG,
HON. ASAHIEL PECK,**

} ASSISTANT JUDGES.

 Tracy v. Atherton et als.

JOHN W. TRACY v. ALONZO ATHERTON AND OTHERS.

Way.

A right of way cannot arise from *mere necessity*, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership.

- This was an action of trespass *qu. cl.* The defendants
- pleaded in justification a right of *way of necessity* from the close occupied by them, over the plaintiff's close, to the public highway; the plaintiff's close lying between theirs and said highway; averring that at none of the said several times when, &c., could the defendants have access to their said close from said highway, or egress from their said close to said highway, or to any other highway or public place, except over and across the close of the plaintiff, without going a greater and more inconvenient and an unnecessary distance, and over and across the closes of other persons; and therefore, that the defendants had, at said several times, when, &c., a necessary way for themselves, &c., and alleging the trespasses complained of to be the passing and repassing of the defendants upon said necessary way, as they lawfully might, &c. There was no averment of any former unity of ownership or possession of said closes, nor of any right by prescription. The plea was answered by a general demurrer. The county court, *pro forma*, adjudged the plea sufficient. To this exception was taken by the plaintiff.

M. L. Bennett, for the plaintiff.

G. F. Edmunds, for the defendants.

BARRETT, J. The plea justifies the alleged trespass, on the ground of a right in the defendants of a *way of necessity*, a right created by the necessity, and in no manner derived from grant, reservation, or prescription. The cases are numerous in which a *way of necessity*, as it is called, has been upheld; but in most instances, it has been on the ground of a grant or reservation implied from the necessity. There are some cases in which the

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reason assigned for the decision seems to favor the idea that a right of way may be created by the necessity, irrespective and independent of any grant or reservation, either express or implied. The one most directly to this effect is *Dutton v. Taylor*, 2 Lutw. 1487. That case, in its facts, falls within the principle announced by the court in deciding *Clark v. Cogge*, Cro. Jac. 170, viz.: "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet shall he have it, as reserved unto him by the law." The case of *Chichester v. Lethbridge*, Willes 71, cited by counsel for the defendants, does not sustain the doctrine involved in the reason assigned for the decision in *Dutton v. Taylor*, viz.: "that the public good required that the land should not be unoccupied." It was, under the second count, which alone was sustained, a case of prescription, in which the necessity was needlessly alleged as showing the origin of the user that had ripened into a right by prescription.

The case of *Clark v. Cogge*, *supra*, which was also cited by the defendants' counsel, was the ordinary one of an implied grant of a way. *Howton v. Frearson*, 8 T. R. 50, was put on the same ground by Ld. KENTON, though counsel urged the right, upon the principle and authority of *Dutton v. Taylor*. The ground on which the decision in *Howton v. Frearson* was put, in connection with the remarks of Ld. KENTON, casts a cloud upon the soundness, if not upon the authority, of the decision for the reason assigned in *Dutton v. Taylor*. He says, "even upon the general ground, I was prepared to submit to the express authority of the case in Lutwich, though I cannot say that my reason has been convinced by it. There are great difficulties in the question; but in the other mode of considering the case" (viz.: as an implied grant), "those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted, even by the plaintiff."

In 1 Saund. 323 a, note 6, the cases are collated, and the doctrine educed is, that a way of necessity, such as the law recognises, results either from a grant or reservation, implied

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from the existing necessity, and that unity of possession at some former time appears to be the foundation of the right.

In *Bullard v. Harrison*, 4 M. & S. 385, the third plea was, in substance, the same as the one now under consideration; and after full argument, Lord ELLENBOROUGH, with some spirit and great point, says: "Then as to this being well pleaded as a way of necessity, it is pleaded without showing any unity of possession or prescription whereby the land over which the way is claimed became chargeable. * * * It seems to suppose that whenever a man has not another way, he has a right to go over his neighbor's close. But this is not so," &c. He then refers to note 6 in Saunders 323 a, as containing the law of the subject and manner of pleading a way of necessity very accurately detailed; and saying "it is a thing of grant," &c.

In *Proctor v. Hodgson*, 29 E. L. & E. 458, in the court of Exchequer, the subject is involved and discussed; and the doctrine in the note on 1 Saunders 323 a, and as held by Lord ELLENBOROUGH in *Bulsard v. Harrison*, is asserted and applied by the court. The same view of the law is explicitly stated in Woolrych on the law of Ways, 72 note q, as well as in Gale & Whately on Easements, upon a review of all the cases, p. 53 et seq. See also Woolrych, pp. 20-21.

The doubt expressed in Hammond's N. P. 198, as to the doctrine of that note in Saunders, would seem to be quieted by the authorities above cited.

Whatever may be the tendency of some of the cases, including that of *Dutton v. Taylor*, the review we have given shows that the law of the subject is, for the present, settled in England.

So far as we have been referred to, or have been able to examine cases in this country, they seem to be uniform in holding or countenancing the doctrine that now prevails in England. In *Nichols v. Luce*, 24 Pick. 102, the subject was fully discussed, and the cases were reviewed by counsel, and in the opinion of the court delivered by MORTON, J., who says, "The deed of the grantor as much creates the way of necessity, as it does the way by grant. The only difference between the two is, that one is granted by express words, and the other only by implication.

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* * * It is not the necessity which creates the right of way, but the fair construction of the acts of the parties. No necessity will justify an entry on another's land," &c.

In *Collins v. Prentiss*, 15 Conn. 39, the subject was thoroughly considered, and the leading cases were cited. WAITE, J., states the law, in substance, as it is stated in the note in Saunders, cited *supra*, and remarks, "And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties." The same case came before the court again, and is reported 15 Conn. 423. The court say, "A way of necessity can only be created in lands owned by the grantor at the time of the conveyance, and must be either reserved in the lands conveyed, for the benefit of the grantor, or created in other lands of the grantor for the benefit of the grantee. It arises from a fair construction of the deed as to the presumed intent of the parties. And it affects nobody but the parties to the deed and those claiming under them."

In *Seeley v. Bishop*, 19 Conn. 134, ELLSWORTH, J., says, "In the case of *Collins v. Prentiss*, 15 Conn. 39, this court recognised fully, and to as great an extent as any other court, the doctrine of a way of necessity." The case of *Pierce v. Selleck*, 18 Conn. 321, cited by the defendants' counsel, does not present any view of the law different from, or in any way modifying the doctrine stated and held in *Collins v. Prentiss*. In *Brice v. Randall*, 7 Gill. & Johns. 349, it is held that the fact that a person has no right of way except over the defendant's land, is not, of itself, sufficient to give him a right of way from necessity.

Chancellor Kent, 3 Com. 423-4, after referring to various English cases, states the doctrine contained in Sergeant Williams' note, cited *supra*, and says, "This would be placing the right upon a reasonable foundation and one consistent with the general principles of the law." 3 Cruise Dig. 37. In a learned note by Professor Greenleaf, it is said, "But necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create this right." He then cites *Bullard v. Harrison*, Sergeant Williams' note, Woolrych on Ways, and Kent's Com., as they are cited *supra*.

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From this reference to the American cases and books, it appears that the law of the subject as now held in England, is received and adopted in this country to a sufficient extent to warrant the court in adopting the same doctrine, so far as it is applicable, in this case. Indeed, if the question were now resting in general principles, unaffected by the discussions and decisions to which reference has been made, we should be very slow to hold that the necessity of a landowner, for a convenient way to and from his land, would create in him the right to encumber the land of a contiguous owner with the servitude of such way, independently of some former unity of ownership of the two parcels, and the implication of a grant or reservation of such right, and independently of any right established by prescription.

If this right, as claimed by the defendants in this case, were to be put on the ground of the requirements of the public good, as was done in assigning the reason for the decision in *Dutton v. Taylor*, it might with propriety be suggested, whether the constitutional provision as to taking private property for public use without compensation, would not challenge consideration as a conclusive objection to the claim.

The provisions of the statute for *pent* or bridle roads, seem to have been made to answer to all the real necessities for a way, such as is claimed to be needed in this case, and at the same time to yield a due regard to the principle and spirit, as well as to the letter of that provision of the constitution.

On the whole, we are satisfied that the plea cannot be sustained either upon principle or authority.

The judgment is therefore reversed.

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Briggs v. Taylor.

WILLIAM P. BRIGGS v. SAVEDRA W. TAYLOR.

Attachment. Action. Officer. Non-joinder of Plaintiff. Abatement. Evidence. Deputy Sheriff. Estoppel. Principal and Agent.

The general owner of property attached by his creditors may maintain a suit against the attaching officer for damage to the property attached through the officer's negligence, while the suit upon which the property is attached is still pending, and the attachment is still in force.

The rights of the creditor and officer in such cases may be protected by an order of court for the stay of execution, or the payment of the damages into court, to await the determination of the original suit in which the attachment was made.

In an action against an officer for negligence in keeping property attached by him, brought by one of the owners, the non-joinder of a co-tenant of the property as plaintiff cannot be used to defeat the action except by plea in abatement. Upon trial the objection can only avail in apportioning or severing the damages.

The expression in an officer's return describing the property attached, "all the hay and grain in the barns and in stacks" on a particular farm, held to embrace grain in the straw.

If it is necessary for the preservation of grain in the straw which has been attached, that it be threshed, it is the duty of the attaching officer to thresh it.

The record of the appointment of a deputy sheriff, made in the county clerk's office, is admissible evidence to prove his appointment, without proving the loss of the original deputation. So, in connection with such record evidence, parol evidence that one acted as sheriff, or deputy sheriff, is admissible to prove he was such.

The fact that the owner of property attached often met the attaching officer and knew how he was keeping the property and did not complain, is not competent evidence against his claim to recover of the officer for his negligence in keeping the property.

Evidence is admissible for the purpose of affecting the credibility of a witness, to prove that he has testified to material facts upon a second trial which he omitted to relate upon the first.

A hired man upon a farm who has had authority to lend the tools and personal property used on the farm, does not retain that authority, even so far as relates to his master, after the tools and property have been attached, and while they remain in the custody of the officer.

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THIS was an action on the case against the defendant, as sheriff of Chittenden county, for the neglect of his deputy, Rolla Gleason, in the care of property attached by him on process against the plaintiff, and was tried by the jury on the general issue at the September Term, 1860, KELLOGG, J., presiding.

The plaintiff offered in evidence two writs of attachment against the plaintiff, one in favor of the National Life Insurance Company, and the other in favor of Joseph Reed, returnable to Washington county court, at its November Term, 1851. These writs were both served by Gleason, as deputy sheriff, September 22nd, 1851, and the officer's returns thereon endorsed stated that he "attached as the property of said Briggs all the hay and grain in the barns and in stacks on the farm of William P. Briggs, in Richmond &c., and left in the town clerk's office in Richmond, a true and attested copy of the original writ with a list of the property attached, with this my return thereon endorsed. I also attached, as the property of the defendant, Briggs, 19 two years old cattle, 4 yearlings, 81 cows, 3 yokes of oxen, 1 yoke of stags, an old carriage, two sets of double harnesses, 1 single harness, 1 cultivator, 1 plow, 1 straw cutter, 1 pair of large wheels, axletree and tongue, 1200 or 1500 pounds of cheese, and 1 pair of traverse sleds."

The plaintiff further proved that the suits in which these attachments were made, were prosecuted to final judgment in favor of the plaintiffs therein, which was rendered at the March Term, 1862. The present action was brought, however, before the rendition of these judgments. These judgments were shown to have been satisfied by the sale on execution of the property attached as above described, and by levy on the plaintiff's real estate.

To prove the official character of the defendant, and of Gleason, the plaintiff offered the record in the office of the county clerk of Chittenden county, of the recognizance of the defendant, as sheriff, taken on the 4th of December, 1850, before the first assistant judge of the county court, together with parol testimony, that the defendant acted as sheriff of Chittenden county, during the year following the 1st of December, 1850.

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Also, a like record of the appointment by the defendant of Gleason, as deputy sheriff of said county, dated December 6th, 1850, and of the official oath of said Gleason, as such deputy, with parol testimony that Gleason in fact acted as such deputy during the year from 6th December, 1850, to December, 1851.

To the admission of these records and evidence the defendant objected, but the court overruled the objections and received the testimony, and the parol evidence so received, tended to show that the defendant and Gleason acted as sheriff and deputy sheriff, respectively, as stated in the plaintiff's offer. No other testimony on this point was introduced.

It appeared by the testimony on both sides that the grain, consisting of a quantity of oats, rye and wheat, was, at the time of the service of the two writs above described, in the straw, in barns and a shed on the plaintiff's home farm in Richmond, and so remained until after the commencement of this suit, no possession thereof having been taken by Gleason, except such as resulted from the leaving of copies in the town clerk's office, as stated in said returns on said writs, and that the old carriage, large wheels and traverse sleds were removed by Gleason, or under his direction, and permitted to remain out doors, and without shelter, from the time of the attachment until after the commencement of this suit, and until they were sold in April following.

The plaintiff's testimony tended to show (and on this point no testimony was introduced on the part of the defendant,) that in the spring of 1851, the plaintiff and one Griffin entered into a contract, not under seal, by which the plaintiff was to let to Griffin, for one year from the 1st of April, 1851, "at the halves," a portion of the plaintiff's said farm, together with thirty-one cows, a yoke of oxen, and sundry other things necessary for the carrying on of the farm, and the manufacture of butter and cheese, the plaintiff reserving to himself a portion of the farm, including one dwelling house, a horse barn, and the right to use such undivided portion of the buildings leased to Griffin, as the plaintiff might have occasion to use for the storage of his own crops, &c., during Griffin's term; that Griffin, pursuant to said contract, moved on to the farm and took possession of the

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property so leased, in the spring of 1851, and remained in possession thereof, (except that portion which was attached and removed on the 22nd of September, 1851,) until the winter of 1851-2; that a portion of the oats attached was raised by Griffin under the contract aforesaid, and on the 22nd of September were undivided and in the barn occupied by Griffin under said contract; and that the cheese, which was attached, was manufactured by said Griffin, under said contract, and was in his possession, and undivided when attached.

The plaintiff claimed to recover for injuries sustained by the cattle, the grain, the cheese, harnesses, old carriage, large wheels, and traverse sleds, from the alleged neglect and want of care of Gleason, in respect to these several articles while in his hands, after the 22nd of September, and before the commencement of this suit. The plaintiff's testimony tended to prove, that the cattle suffered damage, and were reduced in flesh and value, for want of suitable care and food, while in Gleason's possession; that the cheese was not properly taken care of; that the grain by reason of Gleason's want of care in neglecting to have it threshed, was greatly eaten and damaged by vermin; and that the harnesses, traverse sleds, old carriage, and large wheels, were injured to some extent, by exposure to the weather. The defendant's testimony tended to prove the contrary. The defendant offered to show, that the plaintiff, although all along aware of the manner in which the large wheels, attached by Gleason, were being kept and taken care of by Gleason, and although frequently, while the property was in Gleason's hands under the attachment, having conversations with Gleason relative to the property, he never made any complaints whatever of the manner in which Gleason took care of them. To this evidence the plaintiff objected, and it was excluded by the court.

The testimony on the part of the plaintiff tended to show, that late in the fall of 1851, or early in the following winter, one Freeman, to whose premises the traverse sleds, and some of the other property, which was attached on said 22nd of September, was taken by Gleason after the attachment, applied to Gleason for leave to use the sleds; that Gleason told Freeman that he might use them if Briggs (the plaintiff) was willing, and that

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thereupon Freeman applied to Briggs, or to one Marshall for permission to use them, and having obtained such permission, either from Briggs or from Marshall, proceeded to use the sleds during a portion of that winter.

The testimony on the part of the plaintiff further tended to show, that Marshall had been in the employment of Briggs, on his farm in Richmond, for some two years previous to the lease to Griffin, of a part of the farm for one year from 1st April, 1851, and continued to live with Briggs in his house on that part of the farm not leased to Griffin, until after the commencement of this suit, being during all that time Briggs' "foremost hired man;" that Marshall was in the habit while working for Briggs, of occasionally lending plows, hoes and other farming implements belonging to Briggs, and kept on the farm. The defendant's testimony tended to show, that Briggs knew in the time of it, that Freeman was using these sleds, and made no objection thereto.

The plaintiff's testimony further tended to show, that the carriage, when attached, was an old one, but not past use, and that it was of some value, either for use or sale, and that the large wheels were also of some value beyond their irons. The testimony on the part of the defendant tended to prove, that neither the carriage nor the large wheels, were, when attached, of any value, except for the irons which were upon them.

The defendant also objected to the testimony offered by the plaintiff, to show the damage done by vermin to the grain, owned in common by the plaintiff and Griffin, but the court overruled the objection, and received the testimony.

The uncontroverted testimony on the part of the plaintiff tended to show, that after the large wheels were attached, they were removed from under the plaintiff's shed into the highway, a few rods from where they were when attached, and there left until their sale in April, 1852, the place where they were so left being in the highway, and that the plaintiff owned the land adjoining to each side of said highway.

Gleason having been called as a witness for the defence, and having testified that the wheat, from an injury to which the

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plaintiff claimed to recover in this action, was injured by the weevil. The plaintiff (having made the proper preliminary examination of Gleason,) offered to show, that at a former trial of this case Gleason was a witness for the defence, and was examined in regard to the condition of the wheat at the time it was sold by him, and that he did not then mention anything about the wheat being injured by the weevil. To this evidence the defendant objected, but the objection was overruled, and the testimony offered was received.

After the plaintiff's testimony was closed, the defendant requested the court to order a verdict for the defendant, upon the ground that as the suits mentioned in the declaration, and in which the plaintiff claimed the property in question in this case were attached, were pending at the time of the commencement of this suit, the plaintiff had not at that time any cause for action ; but the court refused to so order.

The defendant requested the court to charge the jury, among other things, that there was no legal testimony in the case tending to show that the defendant was sheriff, or that Gleason was a deputy sheriff, at the time of the attachment of the property in question ;

That the returns on the National Life Insurance Company and Reed writs did not show a legal attachment of the grain, and that consequently the defendant was not liable for any injury thereto ;

That it was neither the duty, nor the right of Gleason to have had the grain threshed, and that if the alleged damage to the grain resulted wholly from Gleason's omission to have it threshed, the plaintiff could not recover ;

That as the cheese and a portion of the grain was owned jointly by the plaintiff and Griffin, the plaintiff could not maintain an action in his own sole name, for any injuries thereto, but that Griffin ought to have been joined as co-plaintiff, in respect to this part of the property ;

That as to the old carriage and large wheels, if the jury should find, as the defendant's testimony tended to show, that they were of no practical value, except for their irons ; and that

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they received no detriment, as an article of sale, from their exposure to the weather, the plaintiff could not recover as to them.

But the court declined to charge the jury as so requested, and (among other things not excepted to,) instructed them as follows :

That if the parol testimony tending to prove that the defendant acted as sheriff, and Gleason as deputy sheriff, during the year 1851, was credited by the jury, this, together with the records introduced by the plaintiff to show the official character of the defendant, and of Gleason as aforesaid, would require the jury to find that the defendant and Gleason were such officers respectively ;

That the returns on the Insurance Company and Reed writs, in connection with the other evidence above mentioned, were sufficient to show such an attachment by Gleason, as the defendant's deputy, of all the property in question in this case, as would render the defendant responsible for the proper care of the property ;

That as to the old carriage, large wheels, and sleds, if the jury should find that these, or either of them, were left by Gleason out of doors and exposed to the weather, from the time when they were attached, to the 29th of February, 1852, when this suit was commenced, this was such negligence, as would render the defendant liable in this action, and the plaintiff would be entitled to recover some damage therefor, unless the jury should find the articles were past use, and had no value either for use or sale, when attached, in which case the plaintiff could not recover as to such articles ;

That it was the duty of Gleason to exercise such care and diligence in respect to the keeping of the cattle, and providing them with food, as the average of careful and prudent men exercise with such property of their own ;

That if, for the preservation and prudent management of the grain, it was necessary that it should have been threshed, it was Gleason's duty to have had it done, and if, by reason of such neglect to have the grain threshed, it suffered after it was attached, and the injury and destruction complained of accrued

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after it was attached, and previous to the commencement of this suit, the plaintiff was entitled to recover therefor ;

That if the cattle, cheese, or grain, sustained any deterioration, waste, or injury while in Gleason's hands, under the attachment, the defendant would be *prima facie* liable to the plaintiff, on this action, for the amount of the loss resulting from such deterioration, waste, or injury ; and in that case the burden would be on the defendant, to prove that such injury did not result from any neglect or want of proper care on the part of Gleason.

As to Marshall's authority to lend the traverse sleds to Freeman, the jury were told that there was no testimony in the case tending to show any authority in Marshall to lend the plaintiff's property, which was not on the farm, but that if the plaintiff knew of the use of the sleds by Freeman, and assented to it, he could not recover for any injury to them while in the possession of Freeman, nor until after they had been returned to the possession of Gleason.

In regard to other questions arising in the case, the court gave such instructions to the jury as the case required ; to which no exceptions were taken.

To all which rulings and decisions of the court, to the refusal of the court to charge as requested, and to the charge as above detailed, the defendant excepted.

Hard & French and George F. Edmunds, for the defendant.

Roberts & Chittenden, for the plaintiff.

ALDIS, J. The first question and the important one is, can the plaintiff, being the general owner of property attached by one of his creditors, maintain a suit against the attaching officer for damage done to property attached through the officer's negligence, while the suit upon which the property is attached is still pending, and the attachment is still in force.

The debtor is the general owner of the property ; the attaching creditor has a contingent lien by his attachment—a lien which may be defeated by the debtor's paying the debt, or replevying the property, or by the creditor's failing in the suit,

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or by his collecting his execution of the debtor in money, or levying it upon other property. An injury to the property may happen through the officer's negligence in not properly taking care of it, and must be an injury to the debtor in any event. To the creditor it may be an injury if the debtor has no other property from which the debt can be collected, and the injury to the property attached depreciates its value below the amount of the debt; otherwise it is no injury to the creditor. Hence the creditor can never tell whether it is, or is not, an injury to him till his suit is perfected by judgment, the issuing of an execution, and its levy on the property attached. Then and not till then can he ascertain whether the officer's negligence has caused him damage; and hence until then he can not sue the officer for such damage. This point is conceded upon the argument by the defendant's counsel as we understand. It is difficult to see how it can be otherwise.

But while it is thus uncertain whether the officer's neglect will work an injury to the creditor, it is certain that it must be an injury to the debtor; for whether the property is restored to him or is sold to pay his debts the loss finally falls on him. Even if the loss affects the creditor by preventing him from collecting his whole debt, it falls also upon the debtor, for he remains still indebted for the amount which would have been paid if the property had not been diminished in value.

Thus the debtor's loss is absolute and immediate—the creditor's uncertain and remote.

It seems highly unreasonable to say that the officer may by his negligence depreciate or destroy the value of the property attached, and yet not be liable to be sued therefor. He should be liable to somebody. The interests of all the parties require that his liability for neglect should be ascertained while the wrong is recent, the proof accessible and not forgotten or lost in the lapse of time. So the officer may become bankrupt. To put off a suit till the rights of the attaching creditor are settled by litigation, or as it may be till successive suits and attachments are all ended, would not unfrequently work a delay fatal to any recovery for the wrong. When to these considerations we add the further suggestion that the debtor is the real owner of the

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property and the real and absolute loser by the misconduct of the officer, it seems to us very plain that he should be allowed to bring the suit, unless a recovery by him of the damages would withdraw them necessarily from the lien of the creditor. But this by no means follows. In a suit brought by the debtor for such damage the officer, who is sued, or the creditor might show to the court that the damages were recoverable for property subject to a pending attachment, and the court would thereupon order a stay of execution till the creditor's rights were determined—or might require the money to be paid to the clerk to be held for the benefit of the creditor. Where debts are subject to the trustee process and suits by the creditor have been begun, and other suits have also been instituted to trustee such debts, it is a frequent practice of our courts to stay the rendering of judgment, or the issuing of execution in such suits, until the rights of all interested can be protected. The exercise of the same power for a similar beneficial end would preserve the damages, which the owner of property attached might recover of the officer for negligence, to be ultimately awarded to the party who should be found in the end entitled to the same.

2. It is objected to the maintenance of this suit that Griffin was a co-tenant with the plaintiff of a part of the property sued for, and that the plaintiff can not maintain this suit alone, but should have joined Griffin.

In suits *ex delicto* this objection should be pleaded in abatement to defeat the action. Upon trial, if not so pleaded, the objection can only avail in apportioning or severing the damages; see *Chandler v. Spear*, 19 Vt. We see nothing to distinguish this action from ordinary suits *ex delicto*, or to require the application of a different rule. The ruling as to damages does not appear to have been objected to.

3. The phrase "grain" as used in the officer's return might include grain in the straw. The words are "all the hay and grain in the barns and in stacks." If there were grain in the straw in the barn, we think the plain and ordinary meaning of the words "*all the grain* in the barn" would include such grain, though it might include other grain.

4. Whatever difficulty there may be in determining the extent

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of an officer's duty in taking care of property attached when in the process of manufacture, we see none whatever in regard to his duty to thresh grain in the straw, when it is necessary to thresh it in order to preserve it. It is an act which every prudent man would do, and about which no prudent man would hesitate. It is the ordinary mode of preserving grain from mice and vermin and other causes of waste ; to omit it is negligence .

5. The charge of the court as to the carriage, wheels, and sled obviously intended to follow the language of the decision of this case in the 28th Vt. The language of the charge does not in express terms meet and fully answer the request of the defendant on this point. It does not say, if the carriage and wheels were of no value except for their irons, and these received no detriment from their exposure to the weather, then the plaintiff can not recover for damage to them. But it says in substance if the *carriage and wheels* were past use and had no value for use or sale the plaintiff can not recover. This would lead the jury to consider whether they were of use and value as *a carriage and wheels* (for the plaintiff's evidence tended to prove they had such use and value ;) and to lead them to understand that if they had not *such* value,—if they were only of value for their irons,—then the plaintiff could not recover. We think the charge, though not as full and explicit as it might have been, and as the request plainly demanded, could not have misled the jury to the injury of the defendant ; but rather led them by implication to that conclusion which on this point the defendant claimed to be correct.

6. The copy of Gleason's deputation, as recorded in the county clerk's office, was admissible. Such record is required by law, Comp. Stat. p. 97, §5 ; and may be proved without proving the loss of the original. So that Gleason acted as a deputy sheriff was admissible to prove that he was such.

7. The fact that the plaintiff often met Gleason and knew how he was keeping the property and did not complain had no tendency to show either that Gleason was not negligent, or that the damage was slight. Mere silence of the party is not evidence against him when nothing is said or done requiring or naturally calling upon him to speak. The plaintiff might well

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have been silent, relying on his legal rights and the defendant's responsibility. There was nothing requiring him to complain.

8. The plaintiff claimed damage for injury to the wheat from Gleason's negligence. Gleason denied such injury, and on this trial claimed that the wheat was injured by the weevil. The plaintiff offered to show that on a former trial of this case Gleason, on being examined on this point, said nothing about injury to the wheat by weevil. The evidence offered was clearly admissible as tending to discredit Gleason. It is every day's practice to admit proof to show, that a witness has testified to material facts upon a second trial which he omitted to relate upon the first. Whether the fact tends much or little to discredit the witness must depend upon the circumstances of each case, and the explanations given by the witness.

9. Marshall was the plaintiff's hired man, and had been accustomed to lend farming tools kept on the farm. This would tend to show an authority in him to lend such tools while kept on the farm in the ordinary way. But it would not tend to show any authority to lend such property after it had been attached. By the attachment new relations arise, the condition of the property is changed, and the exercise of such power by the hired man might affect the plaintiff's interests further and differently from what it would if the property was merely in its ordinary condition and use. An authority in the hired man to lend property attached and in the custody of the sheriff can not be inferred from his having exercised such authority before attachment and when the property was in the ordinary use of his employer. There was no error therefore in the ruling of the court, that there was no evidence to show any authority in Marshall to lend the plaintiff's property which was not on the farm.

These we believe are the material points urged by the counsel for the defendant, on the hearing of the case, and as we find no error therein the judgment of the county court is affirmed.

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Consideration. Illegal Contract. Maintenance. Statute of Frauds. Indebitatus Assumpsit. Statute of Limitations. Payment.

An injury to the promisee, as, for instance, if he incurs expenses in reliance upon the promise, or a benefit to the promisor, is a sufficient consideration for a promise.

If the plaintiff and defendant had, or thought they had, a similar interest, dependent on the settlement of the same question, and the defendant promised the other that, if he would commence and carry through a suit in his own name to settle such question, he would pay him one-half of the expenses incurred by him therein, when they should be ascertained. In consequence of and reliance upon such promise the plaintiff brought and prosecuted the suit to a final termination. *Held*, that the promise was founded upon a sufficient consideration.

At the time such agreement was made, it was mutually expected that the defendant would be called as a witness for the plaintiff on the trial of the suit. As the law then stood he could not have testified if objected to on the ground of interest. *Held*, that such mutual expectation was not equivalent to a contract that the defendant should be called as a witness, and that, in the absence of proof of any corrupt intent in such expectation, such an agreement was not void as contrary to public policy, or as *maintenance*.

The offence of *maintenance* now seems to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation.

Held, also, that such promise was not within the statute of frauds as being a promise to answer for the debt of another.

Indebitatus assumpsit for money paid may be maintained upon such a contract to recover one-half the expenses sustained in such suit.

In such case the statute of limitations would not begin to run until after the expense of the suit had been in fact paid by the plaintiff.

A bill for a portion of such expenses was presented to the plaintiff, who thereupon lent the person claiming it a sum of money larger than the account, and took his note for the money with the understanding between them that the account was to go against the note when they should finally settle. *Held*, that this was equivalent to a payment of the bill by the plaintiff, so that he might recover one-half thereof of the defendant in *assumpsit* for money paid.

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INDEBITATUS ASSUMPSIT for money paid. The facts of the case and the rulings of the court below are stated in the opinion of the court. The case was tried by jury at the April Term, 1861, **PIERPOINT, J.**, presiding. The defendant excepted to the charge of the court. The jury rendered a verdict for the plaintiff.

N. Peck and George F. Edmunds, for the defendant.

Daniel Roberts, for the plaintiff.

KELLOGG, J. The plaintiff's evidence on trial tended to show that, prior to 1851, he and the defendant severally had levied executions, each in his own right and neither having any interest in that of the other, upon distinct but adjoining parcels of land in Hinesburg, which had, before such levies, been conveyed by one Boynton, the debtor in said executions, by a deed of conveyance to one Lyman Dorwin; that Lyman Dorwin had died, and that Noble L. Partch was the administrator of his estate, and, as such administrator, was in possession of the lands so levied on; that it was claimed by the plaintiff and defendant that the deed from Boynton to Lyman Dorwin was fraudulent and void as to Boynton's creditors; that the rights of the plaintiff and defendant under their respective levies depended on the same question, viz., the invalidity of the said deed,—and that they so understood the matter, and believed that the practical effect of a suit to test that question, with a recovery therein, in the name of either, would be a surrender by the administrator of the possession of the land embraced in both levies; that, after a considerable negotiation as to which should begin the suit, it was finally agreed that the plaintiff should do so; that thereupon, in August, 1851, the plaintiff and defendant entered into an oral contract that the plaintiff should commence and prosecute an action of ejectment upon his levy against said administrator, and that the defendant should pay to the plaintiff one-half of the expenses of so doing; that it was then and there mutually expected that the defendant would be called as a witness for the plaintiff on the trial of said action; and that the said

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action was commenced and prosecuted by the plaintiff, and tried by a jury in the county court in this county at the March Term, 1852, when the defendant was called and testified as a witness on the part of the plaintiff, and a verdict was rendered for the plaintiff. The plaintiff's evidence also tended to show that it was a part of the original understanding between him and the defendant that he, the plaintiff, should go forward and make the necessary disbursements in the suit, and that the expenses, when ascertained, should be adjusted between them under said agreement. The plaintiff also gave evidence tending to show that, during the progress of the suit, he paid costs, fees, and other expenses therein from time to time, and that, after the suit terminated by final judgment in his favor at the March Term, 1853, he received the taxable costs in the suit through his attorneys, and that he ascertained and paid the balance of their fees within six years next before the commencement of this suit, and that he then called on the defendant to pay him the one-half of such sum, who refused to settle or pay any part thereof. A portion of these expenses consisted of a bill of one Toby, which Toby charged to the plaintiff and called upon him to settle in 1856. The plaintiff recognized the bill as a debt against him, but did not pay it in any other way than by letting Toby have a sum of money larger than the amount of the bill, and taking Toby's note for the money, with the understanding between them that the account was to go against the note when they should finally settle, and no other payment or settlement was afterwards made between them.

The present action is *indebitatus assumpsit* for money paid.

The defendant pleaded (1) the general issue, (2) *non assumpsit infra sex annos*, and (3) *actio non accrevit infra sex annos*. The action was commenced on 2nd March, 1860. The county court on the trial ruled, and instructed the jury, that if the contract as claimed by the plaintiff, and as his evidence tended to prove, was satisfactorily made out, the plaintiff was entitled to recover one-half of all the expenses of said action against said administrator, with interest thereon from the time of such payments, less what the plaintiff had received for the costs in said action. The defendant excepted to this ruling of the court, and several

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questions were raised by him on the trial which are now insisted upon as arising on his exceptions.

L. The defendant insists that there was no consideration for his alleged promise. The plaintiff's evidence tended to show that he and the defendant had a similar interest, dependent upon the settlement of the same question,—that question being in respect to the validity of the deed executed by Boynton to Lyman Dorwin,—and that they so understood the matter, and each believed that the practical effect of a suit and recovery by either would enure to the mutual benefit of both; and that the commencement of the action by the plaintiff against the administrator of Lyman Dorwin was the result of considerable negotiation between the plaintiff and the defendant, and of the express promise of the defendant to share equally in its expenses. Under the ruling of the court the jury have found that these facts were satisfactorily established by the testimony. The action which the plaintiff commenced against the administrator of Lyman Dorwin may therefore properly be considered as having been commenced "at the special instance and request" of the defendant, and for the purposes of the defendant as well as for those of the plaintiff. In *Adams v. Dansey*, 6 Bing. 505, (19 E. C. L.,) the plaintiff, an occupier of lands, having been sued with others by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant, a land owner in the parish who had a similar interest in resisting the vicar's claim, undertook to indemnify the plaintiff from all costs if he would suffer the defendant to defend the suit in his, the plaintiff's, name; and it was held that there was a sufficient consideration for the defendant's promise. So in *Goodspeed v. Fuller*, 46 Maine 141, it was held that if the defendant in a suit at law, at the request of a third person, permits him to assume the defence upon a promise of such third person to indemnify him and pay all costs recovered against him, such a promise was not void for want of consideration. It is not essential that the consideration should be adequate, in point of actual value, the law having no means of deciding this matter, and leaving the parties to the free exercise of their judgments in respect to the benefits to be derived from their bargains; and

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an injury to the party to whom the promise is made, as if he incurs expenses in reliance upon the promise, or a benefit to the party promising, is a sufficient consideration, if the agreement violates no rule of law. Cases are not unfrequent in which the prosecution or defence of suits affecting or involving a similar or common interest, as in the case of water or patent rights, may render the combination of the means of those having a similar interest to be protected or defended, a matter of the highest expediency. Where, in such cases, expenses have been incurred on the faith of an agreement by one having a similar or common interest that they shall be subsequently shared or paid by him, the consideration for such an agreement, it is believed, has never been questioned or doubted. We regard the fact that the plaintiff commenced and prosecuted his suit against the administrator of Lyman Dorwin at the instance of the defendant, and in reliance upon his agreement to share in its expenses, as furnishing a sufficient consideration for that agreement, if the agreement itself was lawful.

II. Was the defendant's agreement void as violating any rule of law, or as being against public policy? It is claimed by the defendant that the purpose of the agreement was to pervert or control the course of justice. This claim seems to rest upon the assumption that the mutual expectation of the parties, at the time of making the agreement, that the defendant would be called as a witness in the suit to be commenced by the plaintiff against the administrator of Lyman Dorwin, was itself a part of the agreement. We do not so interpret the statement in the bill of exceptions in reference to this mutual expectation. It may be conceded, as was held in *Stanley v. Jones*, 7 Bing. 369, (20 E. C. L.,) that an agreement, by one having no legal interest in the controversy, to procure and furnish evidence, has a direct and manifest tendency to pervert the course of justice, and is consequently illegal; but in this case there was no adventure by the parties for a speculation. They were mutually interested in reference to a supposed legal right, depending on the same question, and their purpose was to test the value of that right. That purpose was neither immoral nor unlawful. It is not expressed in the bill of exceptions that it was mutually expected that the

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defendant would be called as a witness with any corrupt design, or in furtherance of any corrupt purpose; and, in the absence of such a statement, we are not at liberty to presume that this mutual expectation of the parties that the defendant would be called as a witness contemplated that he should be called for any other than a legitimate and honest purpose. It is true that, as the law then stood, he would not have been permitted to testify, if objected to, on account of his interest in the event of the suit; but if that interest had been released, as it might have been, or if he was not objected to as disqualified by reason of interest, it would have been his duty, when called as a witness, to have given his testimony. We can not regard the mutual expectation of the parties, that the defendant would be called as a witness for the plaintiff, as equivalent to a contract between them to that effect; and it would, in our judgment, be a forced and unnatural interpretation of the statement of the bill of exceptions to give to it the effect of a contract. But the defendant also insists that this agreement was one for *maintenance*, and should not be tolerated on that ground. The doctrine of the ancient common law in respect to this offence has been much narrowed, and the offence itself seems now to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation. In *Danforth v. Streeter*, 28 Vt. 490, REDFIELD, Ch. J., suggests a doubt whether the offences of maintenance and champerty as they existed at common law are now recognized in this state. It was well said by Serjeant Wilde, *arguendo*, in *Stanley v. Jones*, *ubi supra*, that innumerable exceptions have been engrafted on the old law of maintenance, which, if it were construed according to the ancient rigor, would impede the whole course of modern business. In *Findon v. Parker*, 11 Mees. & W. 675, it was held that one may lawfully agree to promote a suit where he has reasonable ground to believe himself interested, although in fact he is not so; and Lord ABINGER, C. B., after remarking that the old cases in respect to this offence are now exploded, said that "the sole question is, have the parties an interest, or do they believe they have an interest, in the action?" We are satisfied that this offence is not committed by parties who enter into an agreement

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to maintain and defend each other in a matter in which they believe their interest to be identical. Such an agreement implies no unlawful intent, and does not, as we think, violate any rule of public policy. We therefore regard the defendant's agreement as being free from the objections which have been urged against it on the score of its illegality.

III. It is claimed that this was a contract to indemnify the plaintiff against his own debts, or to pay him a share of money which he might expend in the payment of his own liabilities, and that it was consequently within the mischief of the statute of frauds, and that the plaintiff's evidence did not support his declaration for the reason that the money paid by him, not being in discharge of any liability of the defendant, was not paid to the use of the defendant. The agreement, as disclosed by the case, was that the defendant should pay one-half of the expenses of commencing and prosecuting the suit, and the plaintiff's evidence tended to show that it was part of the original understanding that the plaintiff was to go forward and make the disbursements in the suit, and that the expenses, when ascertained, should be adjusted between the defendant and himself under the agreement. The promise of the defendant was not a contract to indemnify the plaintiff against the plaintiff's own debts, but was a direct undertaking to repay to him a share of the money which he might pay on account of the expenses of the suit, which were to be incurred at his instance, and in reliance upon his promise. The promise was therefore an original and not a collateral undertaking on the part of the defendant, and related to his own debt, and not to that of the plaintiff, and it is not within the statute of frauds as being a promise to pay the debt of another person; *Adams v. Dansey*, and *Goodspeed v. Fuller*, *ubi supra*.

IV. The defendant insists that he was entitled to a verdict on the plea of *non assumpsit infra sex annos*, and also on the plea of *actio non accrevit infra sex annos*. The case shows that the plaintiff was to make the disbursements for the expenses of the suit, and that when those expenses were ascertained, they were to be adjusted between the defendant and himself according to the defendant's agreement. The plaintiff could have no cause

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of action until he made the necessary payments resulting from the suit. The issue on the plea of *non assumpsit infra sex annos*, in this state of the facts, became wholly immaterial; for, if it had been found for the defendant, the plaintiff would still have been entitled to judgment upon the whole record; 1 Williams' Saund. 33, n. 2; 2 W. 319 d.; 2 Chitty Pl. 498, note g. As the plaintiff's cause of action did not accrue until the expenses of the suit were in fact paid by him, the plaintiff was entitled to a verdict for one-half of the expenses paid within six years next before the commencement of the suit, and the issue upon the plea of *actio non accrevit infra sex annos* was properly found in his favor.

V. We consider the facts stated in the case in respect to Toby's bill as being equivalent to such an actual payment of it in money by the plaintiff as would make the defendant liable for his share of it according to his agreement.

VI. The effect of the defendant's undertaking and conduct was to request the plaintiff to pay the expenses of the suit, for the purpose of effecting a common object in which they were mutually interested, and the plaintiff did pay those expenses. This was money paid by the plaintiff at the defendant's request. The common count in *indebitatus assumpsit* for money paid is maintainable in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, and with an undertaking, express or implied, on his part to repay it; Chitty on Contracts, (10th Amer. Ed.,) 658-9; *Brittain v. Lloyd*, 14 Mees & W. 762, 773. The request to pay, and payment according to it, constitute the debt; and, for money paid for the use of another, interest is due from the time of payment; *Gibbs v. Bryant*, 1 Pick. 118; *Reid v. Rensselaer Glass Factory*, 8 Cowen 393, and S. C. in Error, 5 W. 587; *Hodges et al. v. Parker et al.*, 17 Vt. 242.

We find no error in the decisions of the county court which were excepted to by the defendant, and the judgment of that court in favor of the plaintiff is affirmed.

Barnum v. Hackett.

ELL BARNUM, *qui tam*, v. AZRO F. HACKETT.

Qui tam actions for fraudulent conveyances and judgments. Evidence. Res Gesta. Declarations.

The defendant in a *qui tam* action for the penalty for taking a fraudulent judgment, was enquired of, six months after the judgment was taken, by the attorney of one of the creditors who claimed to have been defrauded, what his claim was upon which he had taken judgment. He replied that he could not tell, but that all the minutes were left in the files of the justice who rendered the judgment. The attorney immediately examined the justice's files, but could find no such minutes. *Held*, that these facts were not admissible in evidence against the defendant.

Held, also, that the subsequent declarations of one of the parties who confessed the judgment, but who was not a party to the present action, were not admissible to prove that his intent in confessing the judgment was fraudulent.

Such declarations, though made, as the party making them said at the time, while he was on his way to get his share of the money realized from the sale of his property upon the judgment obtained against him by the defendant, are not admissible in evidence as part of the *res gesta*. The *res gesta* consisted of an antecedent transaction, the confessing and taking the judgment.

In a *qui tam* action against the creditor in a fraudulent judgment, or the grantee in a fraudulent conveyance, for the statutory penalty, it is necessary that the intent of both parties to the transaction should be ultimately to defraud creditors. A design to hinder or delay them merely for a time is not within the statute.

The case of *Brooks v. Claves et al.*, 10 Vt. 37, approved and reaffirmed.

But if either party to such mutually fraudulent conveyance or judgment consists of more than one person, those who participate in the fraudulent intent are not relieved from liability under the statute by the fact that all of such persons are not guilty of a criminal design.

In a *qui tam* action for the statutory penalty brought against the creditor in an alleged fraudulent judgment, the plaintiff called, as a witness, one of the firm who were the debtors in such judgment, who testified, among other things, that his purpose in confessing the judgment was not to defraud their creditors, and that his partner's motive was the same as his. The plaintiff introduced other testimony tending to contradict this statement. *Held*, that the statement of the witness as to his and his partner's intent was not as matter of law conclusive, but that the plaintiff was entitled to have the cause submitted to the jury.

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This was an action to recover the penalty given by the statute for being party to certain fraudulent suits and judgments in favor of the defendant against one Merchant and one Fiske, who were partners in the business of peddling. Plea the general issue, and trial by jury at the April Term, 1861, PIERPOINT, J., presiding.

The plaintiff introduced in evidence a certain copy of a writ in favor of the defendant against Merchant & Fiske, dated January 4th, 1860, together with the officer's return thereon, showing the attachment of all their property, and of the record of two judgments rendered by the confession of said Merchant & Fiske in favor of this defendant before a justice of the peace, one of said judgments being rendered on the 11th day of January, 1860, for the sum of \$967.07 damages, and \$15.96 costs, and the other on the 16th day of January, 1860, for \$445.86 damages, and \$15.96 costs, and both judgments purporting to be founded on the cause of action set up in the writ.

The plaintiff then introduced John A. Child, Esq., as a witness, who testified that, being employed by creditors of Merchant & Fiske, he called on Hackett at his house, in Westford, on the 2nd of June, 1860, and inquired of him what his claim against Merchant & Fiske was, and that the defendant told the witness he could not give him a statement of it, that all the minutes and evidences of the debt were left in the files of the justice.

The plaintiff then offered to show, by the witness, that, on going to the justice's files he found no minutes nor evidences of debt there. To this the defendant objected, and the evidence was excluded by the court, to which the plaintiff excepted.

The witness then proceeded to state that he found, at the justice's, the original writ, which he produced, as also an original execution, dated January 16th, 1860, issued on the judgment of \$445.86, and the return of the officer upon it, showing the sale of the property of Merchant & Fiske attached on the writ; that the minute of the second confession of judgment above referred to was pasted over the minute of the first so as to cover it up on the back of the original writ, and that he, the witness, removed it in presence of the justice.

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Child further testified that he was acting for one Skinner, a creditor of Merchant & Fiske, but that he could not say that he informed the defendant that he was acting for any of their creditors.

The plaintiff then introduced as a witness Addison Fiske, who stated that he was one of the firm of Merchant & Fiske; that he went into partnership with Henry E. Merchant on the 5th or 7th October, 1859; that there were written articles of partnership drawn up by the defendant; that, at the time of the formation of the partnership he had goods in his cart, a horse and a peddle cart; that the value of the goods he had on hand was \$217.16, according to an invoice made at the time, which was made partly by the defendant and partly by himself and Merchant, and that the making of the partnership agreement and the invoicing of his goods referred to were done at the house of the defendant, and that this was about three weeks before he went to peddling goods; that when he and Merchant commenced peddling, in pursuance of their partnership agreement, they reckoned up the amount of their goods and found they had about \$1000 worth of property, besides their horses, wagons, &c.; that the witness peddled but seven days, and that the entire amount of the sales of himself and Merchant, from the time they commenced peddling up to the time of the commencement of the defendant's suit (January 4th, 1860) against them, was not more than \$125; that, at the time of the confession of the judgments referred to, he and Merchant had over \$800 worth of goods, and besides, he, the witness, had a horse, harness and peddle cart. The witness also stated that, at the time, they were owing the plaintiff about \$200, and to one Skinner, of Montpelier, about \$600; that the first he ever heard of the suit against him in favor of Hackett was on the 8th of January, 1860, when he went to the defendant's; that Merchant was there, and while he was there Merchant took him out and told him that Hackett had attached their goods; that he, the witness, asked what for? and Merchant replied that he had heard that Barnum was going to attach the goods, and that he, Merchant, had procured the defendant to attach them to keep the plaintiff from doing so, and further told the witness that the defendant had attached all the

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goods that were there ; that Hackett was going to make up an account against them, and was going the next day to Hydepark to attach what goods there were there ; that the witness and Merchant then went in and saw the defendant ; that the defendant told them he had heard Barnum was going to attach and had sent one of his clerks over to inquire ; that Barnum was a tricky man, and always in such games as that ; that the defendant said he would sue them and attach their goods, and help them all he could ; that they could confess judgment, have the goods sold and he would bid them off, and let them have them back to sell to pay their debts ; that the witness told the defendant and Merchant that he wanted to fix it so that Barnum and Skinner could get their pay ; that he, the witness, did not want either Barnum or Skinner to get all the goods, and that he did not want to be sued by either ; that the defendant then said he could fix that so it would be all right ; that he would make up a book account against them, sue and attach their goods ; that they could confess judgment on that account and have the goods posted and sold ; that this conversation was in Hackett's parlor ; that he said he would bid off the goods and let them go back into their possession, and they could sell them and pay their debts ; that there was talk about Merchant's stopping peddling, and his and the witness dissolving partnership ; that the defendant told the witness he would send the goods to him, at Hydepark, and let him sell them ; that, at that time, a part of the goods were at the house of the defendant, in Westford, and part at North Hydepark, in a store ; that the defendant said he would send the goods to the witness after they were sold at sheriff's sale by the officer.

The witness also testified that three notes were executed at that time ; that he wrote one, Merchant one, and the defendant the other ; that these notes were signed by the partners, Merchant and Fiske, and made payable to the defendant, and delivered to him at that time ; that it was talked between the three that it was best to have the notes written by different persons ; that the notes bore different dates, and all amounted to about \$700, and were written for different sums each ; that it was talked that it was best to have dates and amounts different

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because they would look better, and look less like fraud ; that said notes were given for no debt, but the defendant said he was afraid the account would not be large enough to cover all the goods ; that at that time, nothing was said about any debts being due from them to the defendant, but the defendant said he should not use the notes except to save the goods from Barnum ; that nothing was said about the defendant's account except that it was not large enough to cover all the goods ; that no account was shown them, but the defendant said he could make up a book account.

The witness also testified that he did not consider that Merchant & Fiske were owing the defendant any account at that time ; that it was talked that they could go to Mr. Soule's, a lawyer, (in Fairfax,) and have a confession drawn up, and then go before the justice of the peace and confess judgment for the notes and book account ; that this conversation was in the defendant's house, and the previous conversation between the witness and Merchant was had in the piazza of the defendant's house, and was reported to the defendant when they went in.

The witness also testified that on the next day (January 9th,) the defendant and the officer went to Hydepark to attach the goods there ; that the witness went there in the afternoon of the same day ; that while there the defendant stated to one Ordway that he and the witness understood it, (the attachment,) as all right ; that on the next day the witness went back to Westford in company with the defendant and the officer, and on the day following, the defendant, witness, Merchant and the officer, all went to Soule's in company ; that Soule then drew up a minute of a confession of judgment, at the defendant's request, on the notes and the book account, and the witness identified the paper testified to by Mr. Child, (the first confession,) as the one which was drawn up at Soule's ; that they then went to the justice of the peace, and the witness and Merchant confessed to the judgment, as drawn up by Soule, in Hackett's presence, and thence returned to the defendant's house and staid there over night. The witness also stated that the justice, Whipple, signed a blank execution which he gave them to carry to Essex, and have filled

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out, as he did not know how to fill it out; that the witness, on the day following, returned to Hydepark and remained there till the next day, when the defendant's son came for him to return to Westford, and he returned to Westford on the day following; that on his return to Hackett's, the defendant told the witness the notes would show fraud, and they would make fraud out of it, and it would be a state prison offence for all of them; that the defendant said he could give up the notes and they could confess judgment again on the book account, and that would hold the goods; that the witness and Merchant went with the defendant, and at his request, to Essex, in company with the same justice of the peace, and confessed judgment again on book account before justice Whipple; that one Nichols was there and drew up the confession; that the witness heard the defendant request Nichols to do it; that this confession was on the defendant's book account, but that the witness did not see it then, but did see a part of the account at Soule's when they first went there; that he has never seen the account since that time and did not suppose that they owed the defendant anything, unless for board, which could not exceed \$25.00; that the property was sold on execution by the officer; that the goods sold were Merchant & Fiske's goods, and that the plaintiff's debt had not been paid at the time of said confession and sale.

On cross-examination, the witness stated that he did not intend to defraud Barnum or Skinner, but meant to provide for the payment of their debts, and Merchant expressed the same idea; it was two days after confession that the defendant said the notes would not answer; that the defendant afterwards gave the notes up to the witness, and he burnt them; that Nichols asked why they wanted to reduce the amount of the confession, and the defendant replied that they had paid up the notes; that neither the witness nor Merchant made that statement, and did not inquire if it was the true amount of the account; that Nichols asked if they would confess judgment on the account, and they did; the witness did not know the amount, and did not see the book.

The plaintiff then introduced one Asa Ordway, who testified

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that the defendant, when at Hydepark to attach the goods, told him that he and Fiske had an understanding about it, and there would be no trouble.

The plaintiff next introduced one J. L. Crocker, who testified that he was the owner of the store in Hydepark, where part of the goods of Merchant & Fiske were kept previous to the attachment; that the witness had some goods in the same store, and was shut out by the defendant and the officer; that on the witness becoming somewhat excited, the defendant said to him there would be no trouble, as he and Fiske understood it; that on the next morning he had a further conversation with the defendant, and the defendant again stated there would be no trouble, he was going to bid off the goods and put them back and let Fiske have them again.

Another witness, called by the plaintiff, testified that he was present at the defendant's at the time of the service of the writ in the present case, and that the defendant, on being informed by one of the plaintiff's counsel that the object of this suit was to bring things right between the defendant and Merchant & Fiske, and in reply to an inquiry made by the plaintiff's counsel as to the basis of the judgments aforesaid, stated that there was no fraud in obtaining the judgments, and that they were good and valid.

The plaintiff offered testimony to show that, shortly after the sale of the property on the execution, Merchant stated to the witness that the judgments were fraudulent, and that they were confessed, and the property of Merchant & Fiske taken and sold on the execution, in order to avoid the plaintiff's claims, and that this conversation was had while Merchant was on his way to Hackett's for the purpose, as he said, of obtaining his, Merchant's, portion of the money realized from the sale of said property. This testimony was objected to by the defendant, and was excluded by the court, to which the plaintiff excepted.

The court ruled that the plaintiff's testimony had no tendency to sustain the action, and ordered a verdict for the defendant, to which the plaintiff excepted.

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J. French and E. R. Hard, for the plaintiff.

Daniel Roberts and George F. Edmunds, for the defendant.

PECK, J. This is a *qui tam* action to recover the penalty given by statute for taking certain fraudulent judgments by confession in favor of this defendant against Merchant & Fiske, with intent to defraud the creditors of the judgment debtors. It comes here on exceptions taken by the plaintiff on trial before the jury.

The first exception is to the exclusion of certain facts offered to be shown by the plaintiff's witness, John A. Child. The plaintiff having introduced copies of record of the judgments, introduced Child as a witness, who testified that being employed by creditors of Merchant & Fiske, he called on the defendant Hackett at his house in Westford on the 2nd day of June, 1860, (the judgments bearing date in January, 1860,) and enquired of him what his claim was; that the defendant told the witness he could not give him a statement of it, that all the minutes and evidences of debt were left in the files of the justice. He testified that he did not inform the defendant of his employment by creditors. The plaintiff then offered to prove by the witness that on going to the justice files he found no minutes or evidences of debt there. This the court excluded, and as we think, properly. It is claimed to be admissible as tending to show that the defendant made a false statement in relation to his claim. If it would be competent to show the statement false, the evidence offered was not sufficient to prove it so. The statement was that the minutes and evidences of the debt were left in the files of the justice. The offer was simply to show that six months after the date of the judgments Child went to the justice files and did not find them, that is, the minutes and evidences of debt. The defendant was not the keeper of the justice files nor responsible for the manner in which he kept his papers; nor did Child enquire of the justice or make known to him his business, or even see him, at least nothing of the kind is embraced in the offer. The papers may have been there and on enquiry of the justice Child might

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perhaps have found them. More clearly still does the evidence offered fail to show that the papers were not left there. It is claimed to be admissible in analogy to the principle that when one refers another to a third person for information the declarations of such third person are evidence. This principle is limited in its application to peculiar and special cases, if it can even properly apply to any case except where the information thus obtained was given for that purpose, and has been acted on. Before the plaintiff can claim any benefit under this rule he ought at least to show that Child made enquiry of the justice. Nothing appears in this case to make the rule relied on applicable.

The next question is whether the court erred in excluding the declarations of Merchant tending to show his fraudulent intent in confessing the judgments. The criminal intent of Merchant in confessing the judgment was a material fact in the case; the only question is whether his declarations offered were competent to prove it. Merchant is not a party to the suit, but is a party to the alleged fraudulent judgment. The declarations were not made at the time of the confession of the judgment, but subsequently. It is not competent for a party, who has made a conveyance, afterwards to make declarations to be used against the grantee to impeach its validity, even though such declarations relate to his motive in making the conveyance. We can not see why the principle should not apply to a judgment as well as a conveyance. As to declarations of this character made before the conveyance, the authorities are not uniform, but it is not material what the law is in such case.

But it is insisted the evidence is admissible upon the ground that it is a part of the *res gesta*. Merchant made the declarations while on his way to Hackett's, as he (Merchant) said, to obtain his share of the money realized from the sales under the judgment in question. To bring it within this principle we must treat the fact that he was going after the money as the *res gesta*. This is offered to be proved by his declarations. Thus the *res gesta* is first proved by his declarations, and then the further declaration, as to his motive in confessing the judgment, is to be admitted on the ground that it is part of the *res gesta*. This will not do. The *res gesta* in this case is an antecedent act which

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had already been completed, the confession of the judgment. The intent offered to be proved by the declarations had reference to his motive in doing that antecedent act. The declarations do not accompany the act and are not admissible on this ground. Had they accompanied the act of procuring the judgment, the argument would have been more plausible. There was no error in rejecting this evidence.

The next question is, whether the court erred in directing a verdict for the defendant. The court adhere to the decision in *Brooks v. Claves and Morse*, 10 Vt. 37. So far as the questions involved in this case were there decided, that case must govern this. That was a case of a conveyance, but the principles there laid down are applicable also to judgments. In that case the action was brought against the grantee in the alleged fraudulent conveyance, and in this case the action is against the creditor in the alleged fraudulent judgments. The debt in that case and the debts in this case both stand in the same relation to the alleged fraudulent transaction. In neither of the cases is the action against the debtor whose creditors are attempted to be defrauded. In such case, in order to fix the penalty upon the defendant, it must be shown that the intent to defraud creditors existed in both parties to the conveyance or judgment at the time of the transaction, that is, at the time the conveyance was made or the judgment procured. The ground of the decision in *Brooks v. Claves and Morse* is that a combination, concert or collusion between the parties to defraud the creditors, was necessary to a conviction, and that if the intent existed in the mind of the grantees only, the penalty is not incurred. The language of the court in that case is broad enough to warrant the conclusion from it, that in all cases it is necessary. But the rule that requires the criminal intent to exist in both parties, taken in its most comprehensive sense, does not require all the persons who are parties to participate in such corrupt intent. It may exist in both parties, the grantor and grantee, in the debtor and creditor in the alleged fraudulent judgment, without existing in all the persons that compose the party on one side or the other, if composed of two or more. That is not necessary. One of two partners might intentionally mislead the other one, and induce him

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to believe they were justly indebted to the person to whom they gave the judgment or conveyance ; or one partner might, in the absence and without the knowledge of the other, procure a fictitious judgment or take a fraudulent conveyance to the firm, and we think even the strict construction applicable to this, as well as to other criminal statutes, does not require the rule to be extended so far as to shield all in such case because one is innocent. There may be such a combination or common criminal intent between grantor and grantee as to incur the penalty, notwithstanding there is a co-grantor or co-grantee who is innocent of the corrupt intent.

It is claimed that if one of the parties, that is, the grantor or grantee, has such intent ultimately to cheat and defraud creditors, and the other party has an intent only to delay creditors temporarily by preventing an attachment, it is sufficient. In such case the conveyance might be void, but the penalty would not necessarily be incurred because the conveyance was void. The principle that requires the corrupt intent in both parties means a criminal intent in both.

The only remaining question is whether the evidence on the part of the plaintiff entitled him to have the case submitted to the jury. If the testimony of Fiske as to his motive and the motive of Merchant in confessing the judgments, is true, the penalty in this case was not incurred, whatever Hackett's motive might have been. But the facts testified to by other witnesses have tendency to show the necessary fraudulent intent ; and Fiske's testimony to the contrary as to the motive was not as matter of law necessarily conclusive, notwithstanding he was introduced by the plaintiff. Fiske stood in such a relation to the transaction as might have induced him to put as favorable a construction on his conduct and motives as the truth would warrant. As to the motives of his partner, Merchant, it is clear that Fiske's testimony was not conclusive. The case, therefore, should have been submitted to the jury.

Judgment reversed and new trial granted.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF FRANKLIN,

AT THE

JANUARY TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

**HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.**

Stickney et al. v. Crane et al.

ISAAC STICKNEY & CO. v. CRANE & COLECORD, AND TRUSTEE
HENRY LADD.

Assignment for the benefit of Creditors. Trustee Process.

An assignment for the benefit of creditors, if made with the intent on the part of the assignor to hinder and prevent a particular creditor from getting his pay, either from the assigned property or otherwise, except at the pleasure of the assignor, is fraudulent and void as against such creditor, notwithstanding the assignee accepted and acted under the assignment in good faith and in ignorance of such purpose on the part of the assignor.

Such assignment would not be rendered valid by the fact that the particular creditor whom the assignor intended to hinder from getting his pay, was by the terms of the assignment postponed to so many other creditors whom the assignor desired to have paid in the order of preference named in the assignment, that the assigned property would be exhausted before such particular creditor could be reached.

If an assignment for the benefit of creditors be fraudulent and void as to any particular creditor, such creditor may attach and hold the personal property and funds in the hands of the assignee by the trustee process.

But the assignee would not be chargeable under such trustee process with payments made by him to creditors, or even to the assignor, and in violation of the assignment, before the service of the trustee process upon him.

The assignee could not be charged under such trustee process for the amount of a note taken and held by him for assigned property sold by him on credit before the service of the trustee process.

TRUSTEE PROCESS. The cause was referred to a commissioner who reported, among other things rendered immaterial by the decision of the court, the following facts:

The defendants were formerly merchants doing business at Franklin, in this state, and on the 3rd of October, 1855, were possessed of goods and chattels and choses in action amounting to about \$12,500, including \$1,994 in cash deposited in the Missisquoi Bank, at Sheldon. On that day they made an assignment of substantially all their property, except the money deposited in the Missisquoi Bank, to the trustee for the benefit of their creditors. The defendants were indebted to the plaintiffs in about \$3,000, and to other creditors to the amount of \$15,000. This assignment was made by the defendants with the purpose and intent of preventing and hindering the plaintiffs

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from getting their pay on their debt, either from the property assigned or otherwise, except at the defendants' pleasure, and with the purpose and intent of securing to their other creditors named in the second and third classes of the assignment, in the order of preference there named, their pay so far as the property assigned would answer that end. This assignment specifically described the property assigned and the creditors to be paid therefrom, and the order of their payment. It provided that the assignee should dispose of and convert into money all the assigned goods and chattels, according to his best judgment and discretion, and with all seasonable dispatch, and collect all of the assigned choses in action, and apply the proceeds, *first*, to pay the assignee a reasonable compensation for his services, and to defray all cost and expenses reasonably incurred by him in the discharge of his trust; *secondly*, to pay various claims against the defendants in favor of the Missisquoi Bank, and also one debt in favor of one Searle. Then followed five separate classes of creditors, each preferred in the order in which they were stated in the assignment. The debt of the plaintiffs was mentioned in the sixth class. The assignment in the last class included all the creditors of the assignors not specifically named. The assignee accepted the assignment in good faith, and in ignorance of any purpose on the part of the assignors to hinder or delay any of their creditors. He immediately took possession of the assigned property in the store where it had been kept, and leased the store for six months.

It was at the time mutually expected and understood by Crane and Ladd, that Ladd should have the assistance of Crane in managing the business, and that the business of selling goods at retail and on credit should go on, and the purchase of small additions to the stock should be made, until the whole business could be closed gradually in the discretion of Ladd most advantageously. But in this expectation and understanding Ladd acted in entire good faith in fact, and in the belief that it was for the benefit of the creditors. Accordingly the business was continued six months or more after the assignment was made, sales being made on credit to the amount of \$1,704, and purchases of ordinary merchandise being made with assignment

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funds to the amount of \$200 or thereabouts, which were again sold and the proceeds were put into the assignment assets.

The sales on credit were all collected by the assignee, except one debt of \$40, for which the assignee held the purchaser's note. In all these transactions of purchase and sale on credit, (excepting the \$40 debt not collected,) the clear result in cash was greater than it would have been had the assignee proceeded to sell the assigned property for cash in the ordinary way by immediate sales for what the property would bring.

The assignee realized from the assigned property \$8,383.59, and had before this suit paid out to the creditors first provided for in the assignment, \$8,026.32; of which \$1,369.96 was paid out under the circumstances hereafter particularly stated.

The \$1,994 cash hereinbefore mentioned as deposited by Crane & Colcord in the Missisquoi Bank was realized by them from drafts drawn, on the eve of their assignment and in view thereof, against produce in the hands of their consignees in Boston. This sum was kept out of the assignment by Crane, the active partner, for the purpose of securing it to his private use, and was deposited in said bank under the agreement with Mr. Rand, the attorney of the bank, that it should not be drawn out until the paper held by said bank against the assignors, and provided for in the second class of debts in the assignment, should be paid, although it was expected that the assigned property would realize sufficient cash to pay these debts, as it in fact did. This money remained there on deposit until July 19th, 1856, when there was due to the Missisquoi Bank on the paper it held, after applying a former dividend made by the assignee, the sum of \$4,642.45. The assignee on that day paid on this paper from the assignment funds \$3,272.49. The residue of said paper was paid to the bank on the same day by Crane, out of the \$1,964 deposited there as above mentioned. The paper held by the bank was then given up by the bank to Mr. Rand, then acting for Crane. But the assignee was kept ignorant by Crane and Rand of the full payment of this paper, and supposed that said balance of \$1,369.96 was then due thereon, and that the notes were given to Rand to hold for the bank in order to Ladd's more conveniently paying the same, while the purpose of Crane and Rand

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was to hold said notes in that way and receive from Ladd the residue of the amount thereof not already paid by him, and when so received, for Rand to pay it over to Crane for him to pay such debts of his with as he might think best.

Accordingly Ladd, in ignorance of the fact that said notes had already been paid fully, from time to time between July 19th, 1856, and the commencement of this suit, paid over to Rand on said notes sums amounting in all to \$1,426.72. But Rand paid in the mean time by consent of Ladd \$567.80 on a note in the first class of creditors, called the Searle note, which had been omitted in the prior dividends and payment, but of the balance Rand took \$400 to repay that sum due him from Crane for money lent Crane by Rand, and paid over the balance, being \$458.92, to Crane.

The money paid over by Rand to Crane as above stated, was kept and used by Crane in common with his other money, but at some time after the assignment, (the particular time did not appear,) Crane paid creditors named in the third class of the assignment to an amount greater than the sum he received from Rand.

At the date of the commissioner's report there still remained creditors preferred in the assignment to the plaintiffs, unpaid, to an amount sufficient to cover all assets in the trustee's hands in any alternative, reported by the commissioners, and these creditors claimed that the trustee, so far as he had funds, should pay to them.

The assignee had on hand at the date of his disclosure, assets in cash amounting to	\$307.27
And if he was chargeable with the money paid to Rand on the bank debt, as before stated, he had also	1869.96
Making total cash	1677.28
But if being so chargeable he should be allowed the amount paid on the Searle note, as above stated,	567.80
He would then have cash on hand to be accounted for,	1109.43

The commissioner also found that if the assignee was legally entitled to such compensation only for his services, as if he had

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closed up his business without delay and without buying and selling on credit, then he had overpaid himself in the matter by the sum of \$100, which in that case should be added to the amount before stated as cash on hand, making \$407.27; and that if the assignee was chargeable with the amount of the debt for his sale on credit not collected, then there should be added to the above sum the amount of said debt and interest, \$49.

At the time of the disclosure the trustee had on hand of the specific articles assigned, one set of hay scales worth \$113.

● The commissioner upon these facts decided *pro forma* that the trustee was not chargeable.

Upon this report the county court adjudged the trustee not chargeable, to which the plaintiffs excepted.

Isaac F. Redfield, for the plaintiffs. ●

J. Rand, for the trustee.

POLAND, CH. J. The plaintiffs claim to hold the trustee liable for funds that came into his hands by an assignment made by the principal debtors to him as assignee for the benefit of their creditors.

The commissioner to whom this case was sent by the county court to ascertain and report the facts, reported "that said Crane & Colcord made said assignment with the purpose and intent of preventing and hindering the plaintiffs from getting their pay on their said debt, either from the property assigned or otherwise, except at the pleasure of said Crane & Colcord, and with the purpose and intent of securing to their other creditors named in the second and third classes of the assignment, in the order of preference there named, their pay so far as the property assigned would answer that end." The commissioner also reported that the trustee was wholly ignorant, at the time said assignment was made to him, of any such purpose of Crane & Colcord to delay, hinder, or defraud the plaintiffs.

The plaintiffs insist that the existence of such unlawful purpose and design in making said assignment by Crane & Colcord,

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renders such assignment fraudulent and void as to their creditors, or at least as to the plaintiffs, though the assignee at the time of accepting the assignment was ignorant of such purpose.

The authorities which have been produced seem to establish the position assumed. In *Rathbone & Dow v. Platner*, 18 Barb. 272, it was decided that an assignment made by a debtor, of his property, with the fraudulent intent to hinder, delay and defraud his creditors, is void, although his assignees are free from all imputation of participating in his fraudulent designs, and they are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property, to pay their preferred debts.

The same doctrine was also fully held in *Wilson v. Forsyth et al.*, 24 Barb. 105. GOULD, J., who delivered the opinion of the court, says, "It will not do to say that honesty of purpose in the assignee has any effect whatever on that of the assignor, and this latter is the intent with which the assignment is made. He makes the assignment, and no one else, and the making intent is his, and no one's else." So in a case in 1 Sandf. Ch. 85, the Vice Chancellor says, speaking of a general assignment in trust for creditors, "If Phillips made it with the intent to hinder, delay or defraud creditors, it is void, although his assignees were perfectly honest, and entirely ignorant of his designs." The opinions in these several cases seem to be well supported in their reasoning, upon general legal principles, and by many authorities more or less analogous to the point decided. The same doctrine is also laid down by Mr. Burrill in his work on Assignments, 2nd Ed., 421 and 422.

We are satisfied that upon principle, aside from authority, this is the true view of the law. Probably no one would doubt but that when the assignor's object in making a general assignment, was to avoid payment of all his debts, it would be fraudulent and void; why then should it not be so regarded, when his object is to defraud a single creditor; at least so far as such creditor is concerned? It has been sometimes attempted (though it is hardly done in the present case) to liken a general assignment to a trustee or assignee for creditors, to a sale to a *bona fide* purchaser for value, or to a particular creditor in

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satisfaction of his own debt, in both of which cases, the good faith of the grantee will enable him to hold the property, though the grantor was actuated by a dishonest design to defraud some creditor. But in the case of a trust assignment, there is really in making the assignment but one party, the assignor; he is ordinarily the only one who has any purpose or motive in the transaction, and they are often wholly completed without the knowledge of the assignee, and if he has knowledge, he is a merely nominal party, who pays no consideration, and parts with no right in the transaction. The obligation of the assignor to his creditors, and his duty to make payment to them, is a sufficient consideration to support the assignment in trust as a valid contract, if made honestly and in good faith by the assignor, but if the intent of the assignor be fraudulent and unlawful, there is no countervailing equity, and good faith, like that of a *bona fide* purchaser for value, to overcome it. It is argued for the trustee, however, that in the present case such unlawful design of the assignors could have no effect because it really was wholly ineffectual, and the same result would have been produced by the assignment if made with ever so honest a purpose; that as the law when this assignment was made, allowed the assignor to prefer creditors, and say which should be first paid under the assignment, and as the property proved insufficient to pay all, the plaintiffs, who were placed in the lowest class of creditors, would have received nothing, though the assignors might have desired they should be paid. But it is the dishonest design and intent, which the statute is aimed against; it is the unlawful intent which avoids the contract, and not the mere consequence or result of it. So it is well established, that a conveyance of property is not necessarily void under the statute because its effect may be to hinder and delay creditors, if there be no dishonest design to produce such effect in making it. In the early case of *Meux v. Howell*, 4 East 1, Lord ELLENBOROUGH said, "It is not every feoffment, judgment, &c., which will have the effect of delaying and hindering creditors of their debts, &c., that is therefore fraudulent within the statute, for such is the effect *pro tanto* of every assignment by one who has creditors. Every assignment of a man's property, however good and honest

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the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice*, fraud, or the like, to bring it within the statute." The same distinction has been observed in almost innumerable cases since. See Barrill on Assignments 404, and several subsequent pages.

Upon this ground we are all satisfied that the plaintiffs have the right to treat this assignment by the principal debtors to the trustee as being fraudulent and void. It therefore becomes unnecessary to consider the various other objections taken to it.

The assignment, as to the plaintiffs, being illegal and void, whatever was in the trustee's hands, under it, when the trustee attachment was served, was reached by such attachment and holden by it, as effects and credits belonging to the principal debtors.

As the trustee acted in good faith in taking the assignment and in carrying out its provisions, it is not claimed by the plaintiffs, that he can be made liable for any funds he received under it, which he had paid out to the creditors pursuant to the terms of the assignment. The trustee admits that he had in his hands of said assigned property at the time of the service of the plaintiffs' writ, the sum of \$307.27 in money—a note of \$40, taken for some of the property sold on credit, and a set of hay scales.

We see no reason why the trustee should not be held liable for the \$307.27, and also for the hay scales as specific property in his hands.

The plaintiffs claim that he should be made liable not only to this extent, but also for various other sums which had passed out of his hands before the trustee suit was brought, upon the ground that they were paid out in violation of the provisions of the assignment, and of his duty as assignee.

In this category they claim to hold the trustee for the funds received by him for his own services; for \$100 paid for rent of store; for the \$40 note taken for goods sold on credit; and for the money paid to Rand on notes against the principal debtor, \$858.92.

The theory of the plaintiffs' counsel as to these claims is this, that though the plaintiffs are only entitled to hold the trustee at

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all, upon the ground, that as to them the assignment was wholly void and inoperative, and that the property received by the trustee was still the property of the principal debtors, yet that, succeeding in this, they are then entitled to take their place, as the sole creditors under the assignment, and call the trustee to account for whatever he received under the assignment, and to hold him liable for any departure from its provisions.

It appears to us that this ground is wholly untenable, and entirely at variance with the ground upon which the plaintiffs are allowed to hold the trustee at all; that the plaintiffs can not be allowed to say that the assignment is void, and that the assigned property still belonged to the assignors, and that being granted, to then turn round and claim that the trustee held the property for the creditors, and for them especially, under the assignment, and call for an accounting on that basis.

Whether the creditors under the assignment could hold the trustee liable for the money paid to Rand upon the demands which were named in the schedule of first class claims, but which had really been paid by the principal debtors themselves, it is not necessary to decide. As it was done in good faith, with no knowledge that they had been paid by the principal debtors, and it does not appear that the trustee was guilty of any negligence in not knowing it, it would seem at best doubtful, if he could be made liable even upon that basis. But so far as the plaintiffs are concerned, who utterly repudiate the assignment, and claim that the funds all the while belonged to the principal debtors, it seems clear they can not complain of it. If the money had been paid over directly to the principal debtors, before the trustee suit was brought, we do not see how they could well claim to hold the trustee for it. As to the sum paid for store rent, and the sum received by the trustee for his services in the business, these appear to have been assented to by the principal debtors, and the creditors who did not dissent to the assignment, and we do not see how the plaintiffs can complain of them.

The \$40 note is to be regarded as a note in the hands of the trustee belonging to the principal debtors, but the trustee can not be holden for it, as has been often decided.

As the trustee is found to have conducted in good faith and

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been guilty of no fraud, we see no ground to deprive him of his costs in the county court. In this court the plaintiffs will be entitled to recover their costs against the trustee, as they succeed in reversing the judgment below.

The judgment of the county court is reversed, and judgment rendered that the trustee is liable for the sum of \$307.27 in his hands, and for the hay scales as specific property.

JOHN MOORE, DAVID MOORE, AND WILLIAM H. MOORE,
appellants, v. THE ESTATE OF RICHARD MOORE, DECEASED.

Descent.

The Legislature by a special act provided that A. should be heir-at-law of S., "in as full and perfect a manner as if she had been the latter's daughter, born in lawful wedlock." S. died before A. *Held*, that A. did not by virtue of this act become entitled to any share in the estate of a brother of S., who died intestate after S., and from whom S., if she had been living, would have inherited.

APPEAL from the decree of the probate court ordering distribution of the estate of Richard Moore, deceased. Richard Moore, being the owner of certain estate situate in this state, died intestate, leaving no issue nor widow nor father nor mother nor lineal heir. The appellants were his only surviving brothers. Sally Dunbar, wife of John B. Dunbar, of Swanton, was his only sister. She died before the intestate, April 12th, 1859, without issue born of her body. In 1849, the legislature passed the following enactment :

"SEC. 3. Amanda M. Pennock, of Swanton, in the county of Franklin, shall hereafter be known and called by the name of Amanda Melissa Dunbar, and she is hereby constituted heir-at-law of John B. and Sally Dunbar, of said Swanton, in as full and perfect a manner as if she had been the daughter of the said John B. and Sally Dunbar, born in lawful wedlock.

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"SEC. 4. Section 3 of this act shall not take effect until the said Amanda M. Pennock, and the said John B. and Sally Dunbar, shall have made their assent thereto, in writing, under their hands and seals, in the presence of two witnesses, and caused the same to be recorded in the town clerk's office in the town of Swanton." See Acts of 1849, No. 99, p. 145.

The conditions named in the fourth section of this act were fully complied with, and the said Amanda M. Pennock became the heir of John B. and Sally Dunbar. She afterwards married Lewis A. Wright. She claimed one equal undivided fourth part of the intestate's estate, and the probate court allowed her claim, and decreed the estate of Richard Moore to be distributed in equal shares to her and the appellants. From this decree the appellants appealed to the county court, and the cause was tried by the court at the September Term, 1861, ALDIS, J., presiding. The county court reversed the decree of the probate court and ordered the said estate to be distributed in equal shares to the appellants. To this decision Mrs. Wright excepted.

William C. Wilson and Heman S. Royce, for Mrs. Wright.

White & Sowles, for the appellants.

POLAND, CH. J. By the act of the legislature passed in 1849, and the action taken under it, Mrs. Wright became heir-at-law to Mr. and Mrs. Dunbar, and entitled to inheritance in any estate of which they should die seized, however that estate might have come to them. If Richard Moore had deceased before Mrs. Dunbar, and she had received a portion of his estate as one of his heirs, then on her decease, Mrs. Wright would have inherited it from her, by force of the heirship created by said act. But Mrs. Dunbar having died before Richard Moore, no interest ever vested in her in any part of his estate, as no one can be heir to a person living. The point presented by the case is, whether Mrs. Wright on the decease of Richard Moore, became one of his heirs, by right of representation through Mrs. Dunbar, who would have been an heir, if she had then been living. Richard Moore's estate was to be

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distributed, under the fourth rule of descent, given by our statute, "in equal shares to his brothers and sisters, and to the legal representatives of any deceased brother or sister. Under the English statute of distributions 22 and 63, Car. II, c. 10, (from which this fourth rule is substantially copied,) the "representatives of a deceased brother or sister, have been always held to mean the *lineal descendants* of such brother or sister, and not to extend to any other persons, who might be entitled to inherit their estates, if they left no lineal descendants. Such has always been the construction given to our own statutes, and this is not controverted by the counsel for Mrs. Wright. But they claim that the statute of 1849, constituting Mrs. Wright heir of Mr. and Mrs. Dunbar, has in legal effect made Mrs. Wright the child and the lineal descendant of Mrs. Dunbar, so as to bring her within this rule. The act constitutes Mrs. Wright heir-at-law of Mr. and Mrs. Dunbar, "in as full and perfect a manner as if she had been the daughter of, &c., born in lawful wedlock."

It is hardly claimed, that if the act had merely constituted Mrs. Wright *heir-at-law* of Mr. and Mrs. Dunbar, it would have had this effect, but the subsequent words, it is insisted, could have been used for no other purpose, and are mere useless surplusage, unless such effect be given them. But it seems to us that these additional words were used to show the extent and define the limits of the heirship thus created.

Suppose the act had merely declared that Mrs. Wright should be heir-at-law, and Mr. and Mrs. Dunbar left at their decease children living, as well as Mrs. Wright. Is Mrs. Wright to inherit the whole to the exclusion of the children? These words were added, as we think, to avoid any such difficulties, and the substance of the act is, that Mrs. Wright is made heir-at-law of Mr. and Mrs. Dunbar to take the share she would be entitled to as their child.

If Mrs. Wright is entitled to share in the estate of Richard Moore, it must be as one of his heirs, and not as heir to Mrs. Dunbar, because she never had any right or interest in the estate whatever. If it were competent for the legislature to enact that Mrs. Wright should be heir-at-law to Mr. and Mrs. Dunbar,

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and also to be an heir-at-law to the estate of any other person by representation, as their children would be, by their signifying their assent to the act, they have not done so. She is merely made heir-at-law of Mr. and Mrs. Dunbar, to share as their child. It is not enacted that she is their child; or that she is to be considered, and taken in law, to be their child. The act does not make her an heir of Richard Moore, or confer upon her any right of heirship to others, by right of representation. We can not go farther than the statute, which merely authorizes her to take directly as heir from Mr. and Mrs. Dunbar.

No authority has been produced, and we know of none, to the precise question presented by this case, but the cases cited by the appellants' counsel seem to go at least the full extent of supporting what we now hold. In *Stevenson's Heirs v. Sullivan*, 5 Wheaton 207, under this statute, "Bastards shall also be capable of inheriting, or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother," the question arose, whether a bastard could take property left by a deceased legitimate brother, the mother having previously deceased; and it was decided that he could not, though the mother, if living, would have inherited the property of the legitimate son, and upon her decease, the bastard son would have inherited it from her. The principle settled by the case was, that though the statute made the bastard heir to his mother, and made her heir to him, yet he could not inherit from his legitimate brother by right of representation on the part of his mother.

Under a very similar statute in Ohio, it was decided in *Little's Lessee v. Lake et al.*, 8 Ohio 289, that an estate left by a bastard, would not go to the brothers and sisters of his mother, previously deceased, though they were the legal heirs of such mother.

Our own statute relative to the rights of bastards to inherit, is substantially the same, making them legal heirs to their mothers, and their mothers to them.

But it has very recently been held by this court under our statute that illegitimate children do not inherit from legitimate children of the same mother. *Bacon v. McBride*, 32 Vt. 585.

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These statutes give the right of heirship at least to as full extent, as the special act in this case, and there is at least a degree of kindred mingled with it, in aid of a more liberal construction, but in all these cases the courts have held that the statutes only give the right of inheritance directly between the mother and son, and they could not extend it farther. These statutes, too, make the right mutual between mother and child, which is not done by this statute. It may more reasonably be supposed that the legislature intended Mr. and Mrs. Dunbar should be heirs to Mrs. Wright, as well as she to them, than that they intended to make her heir to other persons by mere right of representation through them, after their decease; still we think the act does not make the heirship mutual. If this were held otherwise, the case supposed by the appellants' counsel, that Mrs. Wright should die, leaving Mr. and Mrs. Dunbar and her own parents living, would present a curious dilemma as to who would be her heirs.

In every view we have been able to take of this case, we all agree that Mrs. Wright is not entitled to share in the estate of Richard Moore. The judgment of the county court is therefore affirmed, and the decision is ordered to be certified to the probate court.

WILLARD ANDRUS v. JOHN CARROLL.

Signature of Writ. Process.

The signature of the authority issuing a writ merely to the minute of recognizance at the foot of the writ, is not a sufficient signature of the writ; and for such a defect the writ will on motion be dismissed.

No signature of any justice of the peace, or any other magistrate authorized by law to sign county court writs, appeared upon the face of the paper containing the writ, except at the foot of the minute of the recognizance taken as security for the

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defendant's costs, where a justice of the peace had signed his name. This minute of the recognizance was separated from the body of the writ by the blank space usually left for the signature of the authority issuing the writ.

The defendant moved to dismiss the writ because it was not properly signed.

The county court, at the September Term, 1861, ALDIS, J., presiding, held the signing insufficient, and dismissed the writ, to which the plaintiff excepted.

Kennedy and Noble, for the plaintiff.

James S. Burt, for the defendant.

BARRETT, J. Process, by which a suit is instituted, must bear the official signature of some officer authorized to issue the same. This is the meaning of the statute, in providing that original writs shall be signed by some one of the several judicial officers named; and in providing for the taking and making of the minute of recognizance, upon a writ so signed. The provision of the statute upon the subject clearly imports, that signing of the minute of recognizance is a distinct and different act from that of signing the writ; requiring as it does, that this shall be done upon the writ so signed, as is previously provided.

Without undertaking now to say, whether a writ, and the minute of the recognizance, might not be so blended, as that a single signing would answer, both as a signing of the writ and the minute of recognizance, in substantial compliance with the requirements of the statute, it certainly could not be so regarded, unless the intent to have it so answer should be manifest upon the face of the precept. In this case no such intent is manifest. The precept is in common form throughout—the minute of the recognizance being separate from the preliminary part, and separated from it by the blank space designed for the signature to the writ itself.

Something analogous to this has several times come before this court, in respect to the mode of authenticating depositions.

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It has been held that, where the certificate of oath is separate and distinct from the certificate of caption, a signing, by the magistrate, of the latter certificate alone will not be sufficient.

The rule would apply more strongly to a case like the present, than to a deposition.

We deem the defect fatal, and think a motion to dismiss the proper mode of taking advantage of it. The question, arising upon this motion, is not to be tested by the question, whether the court would allow an amendment in this particular, if it had been seasonably moved for.

Without deciding whether such a defect would be the proper subject of amendment, it is sufficient to say, that the question is not before us on a motion to amend.

Judgment is affirmed.

HEMAN MITCHELL v. CLARISSA CLARK AND ELIAS HODGDEN.

[IN CHANCERY.]

Mortgage. Promissory Note.

If the holder of a promissory note endorse it to a third person and give the latter a mortgage to secure the payment of the note, the mere failure of the mortgagee to charge the endorser upon the note by presentment and notice of non-payment, will not release the land from the burden of the mortgage.

To produce that effect there must have been, in addition to the failure to charge the endorser upon the note, such conduct on the part of the mortgagee as would prevent or hinder the mortgagor from collecting the note of the maker.

PETITION to foreclose a mortgage executed by the defendant Clark to the petitioner. The condition of this mortgage was in the following words: "Provided that if the said Clarissa Clark shall well and truly pay or cause to be paid a certain promissory note for one hundred and sixty dollars, signed May 1st, 1858,

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by James Darling, payable on demand, according to the tenor thereof, then this instrument to be void, otherwise of force." It appeared that this note was given by Darling to the defendant Clark, and was payable to her or bearer, and that she afterwards transferred it to the petitioner in part payment for the mortgaged premises. At the time of the transfer of the note she endorsed it as follows, "pay Heman Mitchell the within note, Clarissa Clark." After the mortgage the defendant Hodgden took a conveyance of the premises from the defendant Clark.

Testimony was taken by both parties to prove and disprove any presentment of the note for payment at maturity and notice to the endorser, which, under the decision of the court, it becomes immaterial to report.

The chancellor rendered a decree of foreclosure for the petitioner, to which the defendants excepted.

H. R. Beardsley, for the defendants.

H. S. Royce, for the petitioner.

BARRETT, J. The mortgage is conditioned for the payment of the note which Darling had executed to Mrs. Clark as payee, and which she transferred to the orator in part payment for the mortgaged premises, endorsed in the common form, as upon the transfer of a negotiable note.

By the transaction the orator became the owner of the note, and by the mortgage the property became pledged for its payment. The orator is clearly entitled to enforce the security provided by the mortgage, unless the condition has been performed by the payment of the note, or he has done that which should preclude him from enforcing it.

The note has not been paid to him by the maker or any body else.

But it is claimed that his course in reference to it has been such as to disentitle him to enforce the mortgage against Mrs. Clark.

It is claimed in the language of the defendants' counsel, that he has made the note his own; and this, solely for the reason,

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that he failed to take requisite steps to charge Mrs. Clark as *endorser*, according to the rules of the law merchant.

We propose to consider and dispose of the case upon the ground on which the counsel put it in the argument.

We are unable to assent to the position assumed by the counsel for the defendants, that the orator's right to enforce his security is only co-extensive with, and limited by, his right to maintain a suit at law, as endorsee, against Mrs. Clark, as endorser of the note in question.

The condition of the mortgage, neither expressly nor by implication, contains any such limitation; but on the contrary, in the most explicit and comprehensive terms, it provides that she shall pay, or cause the note to be paid.

We are clear that there is no principle, or case, which would allow her to stand upon the mere technicality of an arbitrary rule of commercial law, and, independently of any question, whether she had been put to any prejudice, in fact, by the course taken by the orator in reference to the note, stand upon the same ground, in reference to the security, as if, on the one hand, the note had been paid, or, on the other, the orator had, through fault on his own part, put her in a position of loss and detriment, in reference to her rights as against the maker of the note.

It is not claimed, as a ground of defence, that she has been put in any such prejudicial condition in point of fact.

We are unanimous in the opinion, that, in order to hold the orator disentitled to resort to the security of the mortgage, it should be shown that he has taken a course with the note, not only in disregard of the rules of commercial law on the subject, but such as, in fact, would subject Mrs. Clark to loss and detriment, in reference to her right and ability to successfully resort to the maker.

It would seem, in reference to the rights and duties of the orator, *under his mortgage*, that Mrs. Clark occupies a position nearly the same as if she had signed the note as surety, and given the mortgage to secure its payment. In such case something more than mere delay in proceeding to collect the note—something more than the mere non-observance of some technical

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rule, that did not necessarily work prejudice and injury, would be required in order to acquit the pledged security of the lien.

Nor is it true, in other cases, that the right to enforce a mortgage security is limited to the right to sustain an action at law for the indebtedness. A familiar instance is that of the enforcement of the mortgage security, after the debt is barred, at law, by the statute of limitations.

The true view of the subject seems to be, that, either the debt itself must become discharged, so that it no longer exists as an indebtedness, or the mortgagor must become discharged from the pledge created by the mortgage.

In this case the mortgage is not given to secure merely the fulfillment of Mrs. Clark's liability as endorser, but to secure the fulfillment of Darling's liability as maker of the note. Until Darling's liability to pay should have become satisfied, the orator would have the right to resort to the security, unless he has precluded himself from that right, by conduct so to the prejudice of Mrs. Clark, as to discharge, as against her, his right to hold the pledge.

The mere fact of non-presentment and failure to give notice, in compliance with the rules of the law merchant, does not work such a discharge of the pledge.

In this view, it becomes useless to discuss the evidence, or to take time in considering whether, in point of fact, there was such failure to make presentment and demand, and to give notice of refusal or neglect to pay.

The decree is affirmed.

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THE FIRST UNIVERSALIST SOCIETY IN FLETCHER v. WILLIS D.
LEACH AND OTHERS.

*Selectmen. Division of Rents of Public Lands among the several
Religious Societies of a Town. Evidence.*

The selectmen of a town in making division among the different religious societies of the rents of lands granted to the use of the ministry, as provided by Sec. 5, Chap. 89 of the Compiled Statutes, (General Statutes Chap. 97, Sec. 5,) do not act in a *ministerial* but in a *judicial* capacity; and therefore are not liable for an erroneous division of such rents, provided in making it they act in good faith and with reasonable care and diligence, even though such error arose from improperly admitting or excluding evidence upon the matter in question.

Neither the schedule of members of a religious society, as furnished by its clerk, nor its records, are conclusive evidence on the matter of such division by the selectmen, as to who are its members.

When the selectmen have determined the amount of such rents to which a religious society is entitled, the proffer to the society of an order on the town treasurer for the money is a sufficient discharge of the remainder of their duty in the matter.

CASE against the defendants, for fraudulently and illegally withholding from the plaintiffs certain money to which the plaintiffs were entitled as their distributive share of the rents of lands in the town of Fletcher granted to the use of the ministry, and which it was the duty of the defendants, as selectmen of the town, to divide among the several religious societies therein in proportion to their several numbers, agreeably to section 5 of chapter 89 of the Compiled Statutes, (General Statutes, chapter 97, section 5.) Plea, the general issue, and trial by jury at the September Term, 1861, ALDIS, J., presiding.

The evidence introduced by the plaintiffs tended to show that they were regularly organized, and had for many years acted, as a corporation for the support of the gospel, and that they had adopted by-laws in all respects agreeably to the provisions of chapter 85 of the Compiled Statutes, relating to such societies; that on the 28th of February, 1859, there were two other organized religious societies in the town of Fletcher, viz., the

Methodist and the Baptist, and that each of these societies was entitled, with the plaintiffs, to a distributive share of the rents aforesaid; that the mode of becoming members of the Universalist Society, as prescribed by the by-laws, was that those who desired to become members should subscribe their names to the constitution, and that no member could withdraw from said society without paying all his arrearages, and sending a written request to the clerk of the society to that effect; that the clerks of those three societies had for a long time been accustomed to deposit in the town clerk's office, on or before the 28th of February in each year, a list of the names of the members of their respective societies, and that the rents above named had always been distributed by the selectmen to such societies in proportion to the number of their members as shown by such list, and that no question as to the distribution had ever arisen before 1859; that on the 28th of February, 1859, the clerks of these three societies deposited a list of the members of each in the town clerk's office, from which it appeared that the Universalist Society contained seventy-two members, the Baptist Society forty-four members, and the Methodist Society forty-seven members; that the defendants, who were the selectmen of Fletcher, in making the distribution in 1859 of the rents aforesaid struck off six names from the list of the members of the Universalist Society, and only allowed that society such a proportion of the rents as they would be entitled to for sixty-six members, which was one shilling for each member, and drew an order on the town treasurer in favor of the plaintiffs for the sum they would be entitled to upon such computation, which order the plaintiffs refused to receive on the ground that it was not for as large a sum as they were entitled to receive; that the defendants in striking off these six names did not consult the clerk of the Universalist Society, or have any authority from him to do so, and that they professed to strike off these names, for the following reasons: in one case, because the person was not a resident of Fletcher or the vicinity; in another, because the person sent them a written request to strike off his name, and in another, that of one Hurlburt, because one Scott had informed one of the defendants that Hurlburt wished to withdraw from the Univer-

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salist Society, and in the other three cases because their names appeared also upon the list of members of the Methodist Society, as furnished by the clerk of that society on the 28th of February, 1859.

The evidence on the part of the plaintiffs also tended to show that all these six persons whose names were stricken off of the plaintiffs' list of members as aforesaid, were at the time members of the Universalist Society, in accordance with the by-laws thereof, while the testimony of the defendants tended to show the contrary, except in respect to Hurlburt, and that the defendants acted in good faith in striking off these six names, and in the belief that they were not members of the Universalist Society.

It further appeared that immediately after the plaintiff refused to receive the order on the town treasurer which the defendants had drawn for their share of such rents, as aforesaid, the defendants reconsidered the matter and came to the conclusion that Hurlburt should be treated as a member of the Universalist Society, and thereupon, rather than draw a new order, the defendants took a shilling in coin from their own pockets, and placed it with the town order, and offered them both to the treasurer of the Universalist Society, but he refused to receive them, whereupon the defendants left the order and the shilling with the town clerk to be delivered to the Universalist Society or their treasurer, whenever it should be called for. This shilling was the proper amount to be allowed the plaintiffs for adding Hurlburt's name to their list.

The court charged the jury, that, to enable the plaintiffs to recover, it was not necessary to show that the defendants intended to defraud the plaintiffs; that it was the duty of the defendants as selectmen of Fletcher, to make all reasonable inquiries and use reasonable diligence to ascertain who really were members of the Universalist, Methodist and Baptist Societies respectively, and what was the number of the members of each society, and the share of the funds which each of the societies was entitled to; to use their best judgment and act in good faith in so ascertaining the share of each society, and in dividing the funds; that if the selectmen so performed their duty in ascertaining the

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share and dividing the fund between those societies, they would not be liable in this action to the plaintiffs, even though they had by error or mistake distributed to the plaintiffs less than their just share of the fund; but if the selectmen were guilty of negligence in inquiring and ascertaining the respective numbers of the members of each society, if they did not make all reasonable inquiry and use reasonable diligence, and their best judgment in the matter, and the plaintiffs, owing to such negligence of the defendants, were deprived of any portion of the fund to which they were justly entitled, then the defendants were liable in this action, and the plaintiffs could recover.

The court further charged the jury that the lists furnished by the clerks of the societies to the town clerk, were to be used by the selectmen in ascertaining the number of members, but were not binding and conclusive upon the selectmen; that the selectmen might inquire of the persons whose names were on the list, or of other credible persons who would be likely to know, in regard to what society they belonged; that they might act upon their own knowledge and upon reasonable and credible information obtained from others.

The court further charged the jury, that although some of the persons whose names were struck off of the list of the Universalist Society, had not withdrawn from the Universalist Society, by *a written notice* according to the by-laws of that society—so that perhaps for some purposes they might, as between them and that society, still be members of it, still if they had practically and substantially withdrawn from that society, and had ceased to act and worship with them, and had joined the Methodist or Baptist church and society and acted and worshipped with them, the selectmen for the purpose of dividing this fund would have the right to treat them as not being members of the Universalist Society, but as members of the other society which they had joined.

The court further charged the jury that if the selectmen, after making their division and striking off Hurlbut's name, on the next day concluded to allow Hurlbut as a member of the Universalist Society, and thereupon immediately notified the Univer-

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salist treasurer thereof, and offered him the order for the amount due upon the members allowed the previous day, and the shilling in coin for Hurlbut, and he thereupon refused it; and all this was done on the next day and within a reasonable time, so that the plaintiffs could have obtained all their share of the fund within a reasonable time after the time for its division, and before this suit was brought, and the defendants left the order and the shilling with the town clerk, subject to the plaintiffs' order, the jury finding that the order for \$10.98, and the shilling, was the plaintiffs' full share of the fund, then the defendants would not be liable to the plaintiffs in this action; that it was not necessary to tender to the plaintiffs gold or silver to the amount of their share of the fund; that if the selectmen offered the plaintiffs the full amount of their share, partly in an order on the town treasurer in the usual manner, and the balance of one shilling in legal coin, such offer or tender was all that in that respect they were required to do, and was a proper performance of their duty in this respect.

To the charge as above delivered the plaintiffs excepted.

H. S. Royce and J. S. Burt, for the plaintiffs.

W. C. Wilson and H. R. Beardsley, for the defendants.

BARRETT, J. The plaintiffs seem to base their claim to charge the defendants with liability in this case upon the assumption, that their duty, in respect to the distribution of the money in question, was purely *ministerial*—in no part involving the exercise of judgment or discretion, as to the numbers of which the respective religious societies were composed at the time of the distribution to be made. The view, taken by the counsel for the plaintiffs, involves the idea, that the list of members, furnished by each society, is to be the basis of the distribution to be made, without any question, or inquiry to be made by the selectmen, as to the truthfulness of the lists, or the genuineness and *bona fides* of the membership thus represented. If this should be regarded as the correct view to be taken of the

subject it would seem difficult to avoid the result which the plaintiffs claim in this suit.

But we find difficulty in adopting this view.

It is to be remembered, that the statute, upon which the duties of the selectmen arise, in respect to this subject, does not prescribe, or intimate, what shall be the criterion, by which to determine the number of members of the respective societies, entitled to participate in the fund. It is true, that, in another chapter, provision is made for the corporate organization of such societies, in virtue of which, when duly organized, they may become possessed of certain powers, rights and privileges, both in reference to their members individually, and in reference to persons and parties outside of the corporation.

But we know of no provision of statute, nor of any principle or rule of common law, by which, as to outside parties, against whom the society claims rights as a corporation, or aggregated association, depending on the number of its members, their records, and much less a copy of their schedule of members, is to be regarded as conclusive, and to constitute the unquestionable basis and measure of their right.

We think that, while in cases like this, such records or schedule are a proper mode and means of exhibiting the ground and measure of their claim, and entitled to be regarded by the selectmen as an important species of evidence of the number of the real members of the society, still they do not preclude further enquiry by them on this subject, nor shut out from their consideration other evidence, bearing on the question of the number of members actually, and in good faith, belonging to the society.

If this be so, (and of it we have no doubt,) the position of the selectmen, in making the distribution of the fund in question, involves necessarily functions of a *judicial* character, so far as determining the number of members, really, and in good faith, belonging to the respective societies, that may be claiming to share in the fund, is concerned.

In exercising such judicial functions in a given case, it would obviously be the duty of the selectmen to act in good faith, and with reasonable diligence. When they should have done so, and in that

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way determined, for the basis of the distribution, the number of the members of the several societies, there is no warrant of law or reason, for holding them liable for any error they might have committed in this respect, either on account of giving consideration to facts and circumstances that are not proper as evidence, or of disregarding facts and circumstances that are proper as evidence, and entitled to consideration and weight.

No one controverts this principle, though there is often some doubt, and difficulty, and diversity of opinion, as to its application, in particular cases. *Davis v. Strong*, 31 Vt. 332, is a clear assertion of the principle, and an illustration of the remark just made. It also is very much in point as an authority, by analogy, for the application we make of the principle in this case.

The county court seems to have acted upon this view, in the trial of the case, and in the charge to the jury. And we are unable to see that the court failed to give to the plaintiffs every advantage that the law entitled them to, upon the evidence, in reference to this branch of the case.

But it is claimed that the selectmen failed of their duty, in proffering an order on the treasurer of the town.

It is clear that after the number of the members has been determined, the further duty of the selectmen is essentially *ministerial*.

The question is, whether, in the distribution of the money, it was proper for them, in the discharge of their duty, to proffer an order on the town treasurer.

They are authorized to lease the lands, reserving rents, "which shall be annually paid into the treasury of the town."

The 5th section of the chapter on this subject, then provides, that these rents "shall be appropriated, under the direction of the selectmen to the organized religious societies in each town;" * * * "if there shall be more than one such society in any town, the same shall be divided between them in proportion to their several numbers."

It would seem, then, that the selectmen are not the deposita-

ries, or custodians, of the rents, any more than of any other of the monies of the town. They are to be paid into, and kept by the treasurer of the town.

The 5th section does not charge the selectmen with any duty of manual control, and division, and payment, of the money; but only with a *direction* of the appropriation of the money.

It would seem, then, that, when they had determined the amount to which each, or any given society, was entitled, and had announced it to the party entitled, by giving him an order on the treasury for the amount, they would have done not only all that could be required of them, but all that they had any authority to do.

As to the shilling, due on the score of Hurlburt, we think, upon the evidence, the court put the case properly to the jury; and inasmuch as the selectmen proposed to advance the money from their own pockets in coin, the plaintiffs have no cause for complaining that they did not draw a new order for the full amount to which they were entitled.

On the whole we are quite clear that the judgment should be affirmed.

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EDGERTON, ROGERS AND HATCH v. MARTIN AND HEFLIN, AND
TRUSTEE, L. E. PELTON.

Trustee Process. Marshalling of Securities.

The trustee, having become liable for the defendants as receptor, received from them a list of accounts and notes with a written agreement that they were turned out to him as security for liabilities assumed, or afterwards to be assumed, by him for them. Afterwards the trustee purchased property of the defendants and executed his notes to them therefor, with a verbal agreement that these notes should remain in his hands as security for all liabilities which he had contracted for them. While matters stood in this condition the plaintiffs brought the present trustee process. Afterwards the trustee assumed new liabilities for the defendants and took a written agreement from them, pledging as security therefor both the notes and accounts previously turned out to him, and also his own notes above described. The trustee afterwards made collections upon the demands so turned out to him. *Held*, that by their attachment the plaintiffs gained the right that the goods, effects and credits of the defendants then in the trustee's hands, as well as all collections which he should afterwards make on the demands turned out to him, should be applied on his liabilities for them, in accordance with the contract between them existing at the time the process was served; and that the trustee and defendants could make no new agreement in respect to such demands which could interfere with the lien which the plaintiffs acquired thereon by their attachment; and that therefore all collections made by the trustee, up to the time of disclosure, upon the demands so turned out to him before the service of the trustee process, should be applied solely upon liabilities incurred by him for the defendants before the trustee process was served.

Held, also, that the case was a proper one for the application of the principle of equity that where one creditor has a lien upon two funds, and another creditor has a lien upon but one of the funds, the former will be compelled to resort for satisfaction, in the first instance, to the fund upon which he alone has a lien, if that course is necessary for the satisfaction of the claims of both parties.

TRUSTEE PROCESS. The facts in the case and the judgment of the court below are sufficiently stated in the opinion of the court.

The trustee, *pro ss.*

White & Soules, for the plaintiffs.

KELLOGG, J. The questions in this case arise on exceptions taken by the trustee to the judgment of the county court,

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adjudging him chargeable as the trustee of the principal defendants on the facts reported by the commissioner.

It appears from the commissioner's report that the trustee, prior to the April Term of the Franklin county court in 1860, became the receptor of property attached in two suits against the principal defendants, which were returnable to and entered in the county court at that term, and on which final judgments were subsequently rendered against the principal defendants. About the time when the trustee signed the receipts referred to, the principal defendants drew off a list of accounts due to them on their ledger, and of some notes also due to them, upon a little book, and annexed to this list of accounts and notes an agreement in writing, by them signed, in which it was expressed, *inter alia*, that these accounts and notes were thereby "turned out" to the trustee "to secure him for such liabilities as he has assumed or may hereafter assume for us," and that the trustee should be allowed to collect the same, so far as it might be necessary for his proper indemnification against such liabilities. This little book was then delivered by the principal defendants to the trustee. On the 25th April, 1860, the trustee purchased of the principal defendants the entire stock of goods in their store, with the store furniture, for the sum of two thousand dollars, and executed to them four promissory notes, each for the sum of five hundred dollars, payable severally in three, six, nine, and twelve months from that date with interest; and there was, at the same time, a verbal agreement between him and them that these four notes should be a security in his hands for all indebtedness then existing in his favor against them, and for all liabilities which he had contracted for them, and for all payments which he might make for them. The writ in this suit was served on the trustee on the 18th June, 1860. After the execution of the four notes, and prior to the service of the writ on the trustee, he became liable on account of the principal defendants by signing notes as surety for them to a considerable amount, and he also advanced money to them. On the 30th June, 1860, he signed another note as surety for them, and took from them a receipt for all of the notes so signed by him as surety for them as aforesaid, which, after reciting his liabilities

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for them as receiptor and surety, contains an agreement on their part that the trustee is to hold "all notes and claims now and heretofore placed in his hands, to receive the same and to collect and apply the same as soon as he can reasonably do so, and all collections are to apply on liabilities first assumed and first to become due; and he is also to apply the four notes given by him for goods to us for five hundred dollars each in payment of said liabilities, but to account to us for the balance only after said liabilities are taken up and cancelled." On the 6th July, 1860, the trustee signed several other notes to various parties, as surety for the principal defendants, and took from them a receipt for the same, which, after describing the notes, proceeds as follows, viz.: "for the security of which, we have this day placed in his" (the trustee's) "hands accounts and claims for collection to pay said notes; and he is also hereby authorized to hold the balance of his notes given for goods, not applied on other liabilities heretofore assumed, to secure the due payment of these notes above stated." On the 3rd October, 1860, the trustee received from the principal defendants several notes against other persons, for which he executed to the principal defendants a receipt "to account for the same by paying the amount, when collected, on liabilities I heretofore assumed for them as surety;" and, on the same day, the principal defendants placed in the hands of the trustee a list of accounts for collection, to be paid by the trustee, when collected, upon the liabilities previously to that time entered into by him as surety for them,—these notes and accounts so received by him from them at this time being the same debts or demands specified and referred to in the little book before mentioned, and also in the receipt and agreement of the principal defendants, dated 30th June, 1860, as above stated. Until, this time, October 3rd, 1860, the trustee did not have the custody of any of the notes or accounts on the little book, and made no collections upon them, but after receiving them on this occasion he made considerable collections on the same; and the proper application of the sums so received and collected by him is the principal question which arises on the exceptions taken in this case.

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The trustee, up to the time of making his disclosure, had paid out upon liabilities assumed by him for the principal debtors, the sum of \$2,157.96

He had also paid out a large sum of money upon liabilities incurred by him for the principal debtors after the service of the trustee process, the amount of which is not material. He had collected up to the time of the disclosure upon the notes and accounts drawn off in the little book above mentioned, the sum of 673.95

 1484.01

The notes given by the trustee for the store of goods amounted at the time of the disclosure to 2,147.32

The commissioner decided that the collections made by the trustee upon the notes and accounts assigned him, amounting to \$673.95, should be applied solely upon the payments made by him upon liabilities assumed *prior* to the service of the trustee process; and he deducted the balance from the amount due on the trustee's notes, leaving a remainder of 663.31

For which he decided the trustee was chargeable.

The county court accepted the commissioner's report, and adjudged the trustee chargeable for the amount of the plaintiffs' damages and costs, being less than the amount for which the commissioner reported the trustee was chargeable. To this decision the trustee excepted.

The plaintiffs, by the service of their writ in this suit on the trustee, on the 18th June, 1860, attached the goods, effects, or credits of the principal defendants intrusted or deposited in his hands or possession at that time, or which might thereafter come into his hands or possession before the making of his disclosure; and, by such attachment, such goods, effects, and credits were held to respond the final judgment in the suit. (Comp. Stat., p. 256, §2.) The object of the remedy by trustee process is to enable the creditor to enforce against the trustee, in respect to the goods, effects, or credits thereby attached, all the rights

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which the principal defendant could himself enforce at the time of the attachment; and when the trustee has in his possession goods, effects, or credits of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of such defendant, he may be adjudged a trustee on account of the same, although the principal defendant could not have maintained an action therefor against him. (Comp. Stat., p. 262, § 46.) At the time of the service of the trustee process in this case, the trustee was indebted to the principal defendants on his four promissory notes which were executed by him to them for the goods and store furniture in their store on the 25th April, 1860, as already mentioned. This indebtedness was absolute, and, as between him and the principal defendants, was subject only to the verbal agreement made between him and them, at the time when these notes were executed, that the notes should be a security in his hands for all indebtedness then existing in his favor against them, and for all liabilities which he had then contracted for them, and for all payments which he might make for them. In the absence of any such agreement, it would seem that the provisions of the statute, (Comp. Stat. p. 263, § 51,) allowing the trustee to retain or deduct, out of the goods, effects, and credits, in his hands, all his demands founded on contract, express or implied, against the principal defendant, and declaring that he should be liable for the balance only, after all such demands between him and the principal defendant are adjusted, would have protected him to the same extent. The rights of the plaintiffs to the goods, effects, and credits of the principal defendants in the hands or possession of the trustee became fixed and certain by the service of the trustee process upon him; and the principal defendants and the trustee could not afterwards make any agreement in respect to the goods, effects, or credits in the hands of the trustee which would have the effect to subvert or interfere with the lien which the plaintiffs acquired thereon by their attachment. It is true that the trustee could not be held chargeable on account of having notes or securities for money belonging to the principal defendants in his hands, unless it appeared that the money due upon the same was collected or received by him subsequent to the service of the trustee process

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upon him and before the making of his disclosure; but, at the time of the service of the trustee process on the trustee in this case, he had no such notes or securities for money in his hands. He did, however, at that time have in his hands a list of notes and accounts belonging to the principal defendants, contained in the little book before mentioned, which were "turned out" to him before the April Term, 1860, "to secure him for such liabilities as he had assumed or might thereafter assume" for the principal defendants, and this was the only agreement in respect to the notes and accounts so "turned out" to the trustee which was made between him and the principal defendants before the service of the plaintiffs' writ upon him. The trustee now claiming that as the principal defendants did not put these notes and accounts into his hands and control until the 3rd October following, they could then make a new and different agreement with him in respect to the application of the collections which might be made on those claims, and that, in fact, they did make such an agreement, at the last mentioned date, under which he was authorized to apply all such collections by way of securing his liabilities incurred for them after the service of the trustee process. The contract between the principal defendants and the trustee which was made prior to the April Term, 1860, was the only contract which was made or was in force when the attachment by the trustee process was made, and the trustee could, at any time, have made it operative against the principal defendants according to its terms; and, when he received the notes and accounts on the 3rd October, 1860, which were embraced and referred to therein, he still held this contract in his hands, and had never released or surrendered it. At the time of the service of the trustee process, he had two means of indemnity to rely upon for his security against the liabilities which he had then incurred on account of the principal defendants; one being his own notes against them, and the other being the contract in respect to their notes and accounts. After the lien upon his notes which the plaintiffs acquired by their attachment supervened, it was not in the power of the trustee and the principal defendants, by any agreement between themselves, to change, or vary their existing obligations so as to lessen or subvert the legal

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or equitable rights acquired by the plaintiffs by their attachment. If it was allowable for the trustee and the principal defendants, by an arrangement between themselves after the rights of the plaintiffs under their attachment had supervened, so to adjust the burden of the indemnity to which the trustee was entitled as to cast it wholly upon the fund attached, it is very plain that the rights acquired by the plaintiffs under their attachment would be dependent upon the pleasure of the trustee and the principal defendants, and not upon his existing obligations to the principal defendants. The rights acquired by the plaintiffs under their attachment should not be controlled or subverted in this way, and we consider that they had not only an equitable but also a legal right to insist that the collections made by the trustee should be applied according to the agreement in force at the time of the service of their writ. The money collected by the trustee should therefore be applied in satisfaction of the liabilities incurred by him before the service of the trustee process.

No injustice is done to the trustee in respect to his security by this application, because he incurred his additional liabilities for the principal defendants with a full knowledge of the plaintiffs' attachment and lien. The general principles of equity law in respect to the marshalling of securities (1 Story Eq. Jurisp., by Redfield, §§ 633, 645,) may well be applied in this case to the extent of the money collected by the trustee. For his liabilities for the principal defendants assumed prior to the commencement of this suit, he had a lien on, or interest in, two means of indemnity, viz.: on his own notes which he had executed to them, and on the money collected on demands belonging to them, which, by their agreement, were "turned out" to him for the express purpose of securing these liabilities. The plaintiffs by their attachment acquired an interest in or lien upon only one of these funds.

We are satisfied that the commissioner made the appropriate application of the money collected and received by the trustee on the demands belonging to the principal defendants in his hands, and that the trustee was properly held chargeable for the amount of his notes to the principal defendants, deducting

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therefrom the balance of his payments (after making the application above mentioned) for or on account of liabilities assumed by him for them before the time of the service of the plaintiffs' writ upon him in this suit.

The judgment of the county court, by which the trustee was held chargeable upon the commissioner's report, is consequently affirmed with costs. The judgment against the principal defendants, not being excepted to, is affirmed without costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON,
AT THE
JANUARY TERM, 1862.

PRESENT:
HON. LUKE P. POLAND, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. JAMES BARRETT, } ASSISTANT JUDGES.
HON. LOYAL C. KELLOGG, }

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JOHN T. RICH v. SCHUTLER DOANE AND GEORGE W. DOANE.

[IN CHANCERY.]

Mortgage. Construction of a Conveyance of Premises with a Bond to Reconvey. Chancery.

The question whether a conveyance of land and the cotemporaneous execution of a bond by the grantee to the grantor to reconvey upon the payment of the consideration of the deed and interest, constitute a mortgage or not, is one of fact, in the solution of which all the circumstances of the case are to be considered as evidence.

Such cases are watched with jealousy by courts of equity, and in doubtful cases the transaction will be regarded as a mortgage. POLAND, CH. J.

In order to make such a transaction a mortgage there must be a debt to be secured thereby. It seems that the debt need not be in such form that it can be enforced by action against the debtor. POLAND, CH. J.

The facts in the present case that no note or other evidence of debt was executed by the grantor, and that the grantee went into immediate possession of the premises, were held to be evidence tending to show that the transaction was not a mortgage, while on the other hand, evidence that the grantor was in embarrassed circumstances at the time, and that the price paid for the conveyance was less than the value of the premises, was held to have a tendency to prove the transaction a mortgage.

Under all the circumstances of the present case the transaction was held to be a sale with a right of repurchase, and not a mortgage.

In such a case, if the grantor subsequently claims the transaction to be a mortgage, the grantee may maintain a bill in chancery to have it decreed to be otherwise.

BILL IN CHANCERY. The bill was brought to the June Term, 1861, and set forth that on the 25th of January, 1859, the defendants were the owners of three undivided fifths of a farm in Shoreham, of which the orator owned one-fifth, being the farm of Reuben Doane, deceased, the father of the defendants; that on that day the defendants, in consideration of \$2200, sold and conveyed by deed to the orator their interest in such farm; that on the same day the orator executed to the defendants a bond in the penal sum of four thousand dollars, conditioned that if the orator should, on the payment of \$2200 by the 15th of February, 1859, with interest thereon from

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January 25th, 1859, deed to the defendants the said three-fifths of said premises so conveyed to them by him, the bond should be void, and further conditioned that if the defendants should fail to make such payment by the 15th of February, 1859, but should procure for the orator a sufficient lease of that part of the estate of Reuben Doane, which was set off to his widow, Martha Doane, as dower, or in default of procuring such lease, should give the orator sufficient security that he should occupy such dower during Martha Doane's life, and should also pay the orator \$2200 by the 1st of December, 1859, and the interest thereon from January 25th, 1859, and \$800 in addition thereto, and if in such case the orator should convey to the defendants the said three-fifths of the said premises so conveyed to him, and also one undivided fifth part of the same premises besides, and should also pay them \$100 per annum as rent of the said dower, then also the said bond should be void.

The bill further set forth that immediately after the execution of such conveyance and bond, the orator entered into possession of the premises, and had ever since continued therein, and had made improvements thereon, claiming to hold the same as upon a conditional purchase, subject only to the condition mentioned in said bond, and not upon a mortgage, and that the transaction was intended only as a conditional sale, and that the relation of debtors and creditor was not thereby created, and did not exist between the defendants and the orator; that the defendants had not performed any of the acts, stipulated to be done by them in the condition of said bond, but that nevertheless they claimed that the aforesaid transaction constituted only a mortgage of the premises so conveyed from the defendants to the orator to secure the payment of \$2200 and interest, and asserted that they should at some future time, according to their convenience, take measures to enforce their right of redemption of the premises under such pretended mortgage; and that therefore it had become important for the interest of both parties that the nature and extent of the orator's interest in the premises should be determined by the court.

The orator prayed that the court would decree the aforesaid agreement to be a conditional sale of the premises, and declare

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the estate of the orator therein absolute and free from any lien, claim, or equity of redemption by virtue of said bond ; or if the transaction aforesaid constituted only a mortgage to the orator, then that the court would decree a foreclosure of the same upon the usual terms.

The answer of the defendants denied that the transaction was anything but a mortgage, and claimed their right of redemption thereunder.

The answer was traversed, and testimony was taken upon both sides, the substantial result of which is stated in the opinion of the court.

In the court below, PIERPOINT, Chancellor, rendered a decree that the agreement set forth in the orator's bill constituted a conditional sale of the premises, and that the orator's estate therein be declared to be absolute and free from any claim or equity of redemption on the part of the defendants. From this decree the defendants appealed.

M. L. Bennett, for the orator.

E. J. Phelps, for the defendants.

POLAND, CH. J. The single question to be determined in this case is, whether the conveyance from the defendants to the orator, and the orator's bond for a re-conveyance, constitute a mortgage for the security of a debt or loan, or an absolute conveyance, with a right of repurchase in the defendants.

Upon the face of the papers it is clearly the latter, and as the law allows, and upholds, conveyances of this character, this apparent character must be considered as the true and real one, unless the evidence establishes that it was in fact different.

It is perfectly well settled, however, that, whatever may be the form of a conveyance, evidence is admissible to show that in fact it was intended merely as a security for a debt, or loan of money, and when that is made out, equity will wholly disregard the form of the conveyance, and preserve and protect the right of the debtor or borrower to redeem his estate.

And in such cases courts of equity have followed the rule

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which have been applied to all cases of transactions between mortgagor and mortgagee, of regarding the mortgagor as the weaker party, dealing at a disadvantage, and needing protection, so that such cases have been watched with jealousy, and if enough was proved to render it fairly doubtful, whether the conveyance was a mere security for a debt, or an absolute conveyance with a right of repurchase, the premises have been held to be redeemable.

It comes to be then a question of fact, to be determined upon the evidence, whether the conveyance from the Doanes to the orator was a mere security for a loan of money, or an absolute conveyance with a right of repurchase by the grantors. We have the testimony of five witnesses in the case who profess to have known substantially all the facts in relation to the transaction. On the part of the orator, Mr. Conroe, Judge Rich, and the orator himself, testify that the offer of the orator was for a purchase of the land, and the contract as executed was a purchase of the land, and not a loan of money with security. The two defendants do not represent that the money advanced by the orator was called a loan, or that it was so understood or regarded, but they say they were to have the privilege of redeeming. They are not explicit that this was the language used, but seem rather to state this as their idea of the legal effect of the transaction. We do not regard this language as having a very strong tendency to show that the transaction was not what it purports to be on its face, an absolute conveyance with a right of repurchase; for if the defendants by the contract had the right to again become the owners of the estate by repaying to the orator the purchase money, they might very naturally, and not very inappropriately, call it a right to redeem. The transaction as stated by the orator and his two witnesses, is clearly an absolute sale, with a right of repurchase by the defendants, and if the testimony of the two defendants would make the conveyance a mere security for the money advanced by the orator, the balance of the evidence must still be in favor of the orator.

In all this class of cases, one principle has universally been recognized, that in order to convert a conveyance absolute upon

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its face into a mortgage, or security merely, there must be a debt to be secured. Some of the cases go so far as to hold that there must be a debt in such form, that it can be enforced by action against the debtor, while others have denied it. We have no occasion now to decide, whether the debt must be such that it could be enforced by action against the debtor, the tendency of later cases seems to be against it. But all agree that there must be a debt or loan to be secured, that the relation of debtor and creditor must exist between the grantor and grantee, in order to lay the foundation for converting an absolute deed in form, into a mere security. In this case there was no note or bond or other evidence of debt executed by the defendants, and though this is by no means conclusive, still it is a circumstance favorable to the orator, as if the parties intended the conveyance merely as a security for a loan or debt, it would have been natural that the ordinary evidence of a debt should have been required and given.

But from all the evidence there appears to have been nothing said about a loan, or debt, or mortgage; the whole talk was of a sale and purchase, and one of the defendants states in his testimony that they tried to get the orator to give a larger sum, which tends strongly to show that the defendants did not understand that the conveyance was merely a mortgage or security for the sum advanced. Another fact tends strongly to the conclusion that the conveyance was not intended as a mere security for a loan of money; that is, that the orator was to have, and did have, the immediate possession and use of the premises.

The argument for the defendants has been based principally upon the fact, that they were at the time of the conveyance in embarrassed circumstances, and under the necessity of raising money to meet existing liabilities upon them; and that the sum paid by the orator was less than the fair value of the premises conveyed to him by the defendants. Evidence of this character is always admissible and material in determining whether a conveyance is absolute, or only a security, because it is more reasonable that a man should give a security upon his property for a sum less than its value, than that he should part with it by an absolute sale, for such an inadequate remuneration. So a

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borrower in distress would be more likely to submit to put his property in a condition where his right to redeem might be put in jeopardy, perhaps wholly lost, than one standing in a more independent position, and dealing at no such disadvantage.

But these circumstances will not make an absolute conveyance a mortgage, when it is shown clearly, or conceded, that the conveyance was in fact absolute; they are only evidence to be weighed, as to its real character. A conveyance which was fully understood and intended to be absolute, might be obtained under such circumstances of distress on the part of the grantor, and for such an inadequate price that a court of equity would set it aside as unconscionable, but they would not for such reason alone, decree it to be a mortgage. This is not the view in which this evidence is urged in the present case.

It is difficult to determine with anything like accuracy from the evidence in the case, what was the fair value of the share of the farm conveyed by the defendants to the orator. The defendants owned but three-fifths of the farm, and the orator owned but one of the other fifth parts. It was encumbered by a right of dower in the widow, and a right of homestead, and a portion of it was subject to an annual rent.

It is manifest that under such circumstances, the defendants could not reasonably expect to get so great a price in proportion, for their shares, as the whole farm would command, and that the price would be reduced by the incumbrances, much more than they could be mathematically calculated. The price the orator paid the defendants for their shares, was more than he paid for the share he had already purchased, and but a trifle less than he was to sell his share to them for, in case they chose to repurchase, and to take his share, as they were to do in such case.

We are inclined to believe that the sale to the orator was for somewhat less than the fair value of the premises, but the inadequacy was not so great, as to furnish very strong evidence that the conveyance was only a mortgage in disguise.

The conduct of the parties since the conveyance, seems to be entirely in harmony with the idea, that when the defendants allowed the time to expire without repurchase, they had no further right. The orator so treated it, he has sold a part of the

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premises, and remained in possession of the residue, making no call for payment on the defendants. The defendants appear to have made no objection to these acts of absolute ownership by the orator, and no effort or offer of payment, as if they were the orator's debtors, and the conveyance but security.

But what is most satisfactory to us that this conveyance was not understood by the parties to be but a security for the money advanced by the orator, are the various provisions in the bond executed by the orator to the defendants, of the same date with the deed, and the other bond from the defendants to the orator.

The defendants contracted that the orator should have a lease, or the undisputed possession of the widow's dower, by paying one hundred dollars yearly for the use of the same.

The orator contracted to convey his fifth part of the farm to the defendants, for eight hundred dollars, in case they repaid the twenty-two hundred dollars he had paid for the farm, and the defendants were not entitled to make such repurchase without becoming purchasers of the orator's share in the farm. Now it is not pretended that all these various stipulations were not *bona fide*, and intended to be fully carried out. But they are wholly inconsistent and incompatible with what the defendants now claim, that the deed was a mortgage to secure the sum advanced by the orator.

We are of opinion, therefore, that the defendants have wholly failed to show that the true character of this conveyance was different from that appearing upon its face, and no question has been made, but that in that event the application of the orator to have its true character declared was to the proper jurisdiction of the court. The decree of the chancellor is affirmed, and the case remanded to be perfected.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF RUTLAND,
AT THE
FEBRUARY TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG,
HON. ASAHIEL PECK, } ASSISTANT JUDGES.

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 WILLIAM R. SMITH v. WILLIAM WILBUR, *Appellants*.

*Subpoena. Process. Authorized Person. Costs. Tender of
Amends.*

A subpoena for a witness may be directed to an indifferent person to serve and return, and, if issued by a justice of the peace, an authorization endorsed upon the precept by the justice is not necessary.

An indifferent person serving a subpoena is entitled to full fees therefor.

The party to whom a tender of amends and the accrued costs is made, is entitled to be tendered the travel and attendance fees of a witness whom he has in good faith subpoenaed to attend an approaching trial of the cause, provided there is not sufficient time before the trial by reasonable diligence to notify the witness not to attend, even though at the time of the tender no fees have been paid to the witness.

Quere, whether the non-attendance of the witness at the time appointed for the trial renders the rule otherwise.

The party to whom the tender is made is not bound to inform the other party that he has summoned such witness, if no inquiry is made of him in regard to the fact or the amount of his costs.

A tender of amends and the accrued costs, under the act of 1856, Gen. Stat., Chap. 25, sec. 44, is not the subject of a plea in bar, nor a matter to be tried by the jury. Its effect is only upon the costs of the action, and that rests wholly in the discretion of the court.

TRESPASS for taking a heifer. Plea, not guilty, and a tender of sufficient amends for the injury complained of, with the accrued costs, in accordance with the statute, act of 1856, No. 15, General Statutes, chapter 25, section 44, p. 200. The plaintiff replied, traversing the tender of sufficient amends. The cause was tried by jury at the March Term, 1861, KELLOGG, J., presiding.

The defendant introduced evidence tending to show that on the 5th of December, 1859, and more than twenty-four hours before the time appointed for the trial of this cause before the justice of the peace, he tendered the plaintiff twenty-seven dollars for his damages in consequence of the alleged trespass, and for the costs then accrued; and he brought the same money into court.

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The plaintiff claimed that at the time of this tender his costs already accrued amounted to nine dollars and twenty-two cents. The defendant admitted the correctness of this bill of costs with the exception of the items for the service of two subpoenas and those for the travel and attendance of three witnesses.

It appeared that the justice's court in the cause was appointed for the 6th of December, 1859, at Danby, and that previous to that time and in preparation for the expected trial the plaintiff had taken out two subpoenas, which were addressed at the beginning of the subpoenas "to the sheriff of Bennington county, his deputy, any constable in the county, or James Martin, an indifferent person." No special authorization to Martin was endorsed upon either of these subpoenas. These subpoenas were served before the defendant's tender, by one John A. Martin, as an indifferent person, and in the plaintiff's bill of costs full fees were claimed for such service.

It did not appear that any fees for travel and attendance had been paid to the witnesses so summoned previous to the time of the defendant's tender. Three of the witnesses so summoned resided in Landgrove, and the plaintiff's testimony tended to prove that at the time of the defendant's tender the roads were so obstructed by snow drifts that it was impossible by the exercise of reasonable diligence to notify these witnesses in season to prevent their attendance before the justice on the 6th of December, the day named in the subpoena.

Two of these three witnesses actually did attend on that day. Included in the plaintiff's bill of costs of \$9.22 were the usual charges for travel and attendance of these three witnesses. There was no evidence tending to show that at the time the tender was made, the plaintiff said anything to the defendant in relation to the costs of the suit then accrued, or in regard to his having issued any subpoenas, nor that any enquiry was made of him by the defendant in respect to either of those matters.

The court, among other things not excepted to, instructed the jury, as to the sufficiency of the defendant's tender, that if a subpoena is served by an indifferent person to whom it is therein directed for that purpose, such person would be entitled to receive the same fees for such service which a proper officer,

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authorized by law to serve such precept, would be entitled to charge for the same service, and that the provision for the allowance of half the fees of a regular officer was applicable, under the statute, (Comp. Stat., p. 234, §§ 39, 40,) only to the case where the person serving the process derives his authority from an indorsement upon the precept by the magistrate to whom it is returnable; that if the plaintiff had, at the time of the defendant's tender, caused the subpoenas to be served, as his testimony tended to prove, the fees charged for such service in his bill of costs were proper and legal; and that if the plaintiff caused a subpoena to be served upon the three witnesses in Landgrove, requiring their attendance as witnesses before the justice's court in this suit prior to the making of the said tender as aforesaid, as the plaintiff's evidence tended to show, he would thereby become liable for their fees for travel and attendance pursuant to said subpoena, in the event of such attendance, and if, at the time of the making of said tender as aforesaid, it was not possible for the plaintiff, by the exercise of due and reasonable diligence, to give notice to these witnesses, so as to save or prevent their travel and attendance pursuant to said subpoena, their fees for such travel and attendance ought to be considered as a part of the taxable costs of the plaintiff, which had then accrued.

The defendant excepted to so much of the charge of the court as is above detailed.

The jury returned a verdict that, as to the first issue joined, the defendant was guilty, &c., and found for the plaintiff to recover \$22.08 damages, and that, as to the second issue joined, the defendant did not make a tender of sufficient amends for the plaintiff's damages and costs then accrued.

M. H. Cook and J. Prout, for the defendant.

———, for the plaintiff.

POLAND, CH. J. The questions now attempted to be made by the defendant as to the costs of serving the subpoenas, that a person can not be properly authorized by the justice to serve a

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subpœna, except by an authorization endorsed upon it as provided by section 39 of chapter 29, Compiled Statutes; and also that it was served by a different person from the one named in it, were not made in the county court, and so can not be raised here. The exceptions say that the only question made as to these fees, was, whether the person serving them was entitled to full fees, or only half fees, as provided for authorized persons by the statute above referred to.

This question does to some extent involve an inquiry into the propriety of this mode of authorizing an indifferent person to serve a subpœna. The statute does not, in terms, authorize a justice of the peace to direct a subpœna, or any kind of process, to an indifferent person to serve. The form given by the statute for a citation to a party to attend the taking of a deposition, implies that it may be directed to and served by an indifferent person. That is more nearly allied in character to a subpœna than either are to ordinary legal process, whether *mesne*, or final. This mode of directing subpœnas, has been generally practised in the state, and it has never been understood that the persons thus authorized were restricted to half fees. The case of *Mattocks v. Wheaton*, 10 Vt. 493, by implication at least, sanctions the idea [that a subpœna may be so directed, and though it was held in that case that if the subpœna was served by an indifferent person, not named in the direction, the witness was not liable to the penalty for not obeying the subpœna; still WILLIAMS, CH. J., who gave the opinion, intimates that this is not such an irregularity as would prevent the party from taxing for such service in his costs. This intimation was followed in a recent case in Orleans county, *West v. Walworth*, 33 Vt. 167, where it was expressly decided that a party was entitled to tax for the service of a subpœna by an indifferent person, not named in the direction. It must be regarded now as fully settled by proper adjudication, as well as by long practice, that this mode of directing subpœnas is legal and proper, and that the case is one not within the 39th and 40th sections of the statute. The language of the 39th section seems clearly not to include subpœnas, but to apply only to precepts *returnable to him*, while justices of the peace are authorized to issue subpœnas for

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witnesses returnable before other justices, or any other tribunal in the state where witnesses are needed. If subpoenas do not fall within the class of process named in the 39th section, it is not claimed that the fees for serving them come within the restriction of the 40th section.

The defendant insists that at the time he made his tender of amends to the plaintiff, he was not bound to tender for the travel and attendance of the three witnesses who had been summoned by the plaintiff; that those could not be properly considered as costs then accrued, because their fees had not then been paid, and not having been paid, or tendered, the witnesses were not legally bound to appear. But we are of opinion that in respect to the costs to which a party is entitled, no such strict principle is to be applied. The plaintiff had summoned his witnesses in the usual mode, and in good faith, and had placed himself under a legal liability to pay them if they attended, and the jury have found that it was impracticable for the plaintiff then to countermand their attendance. The fact that the witnesses' fees had not been paid, or tendered, so that the plaintiff could have had a remedy against them if they failed to appear, was a matter wholly between himself and the witnesses; his liability to them, incurred in a reasonable mode, was sufficient to entitle him to a tender of their fees. We have felt some doubt, whether if the tender had proved large enough, deducting the fees of the witness who did not attend the trial, it ought not to be held sufficient, but as it appears that the damages found by the jury and the costs, deducting the fees of this witness, exceeded the sum tendered by the defendant, the result must have been the same, so that if there was error in this particular, it need not disturb the judgment. The fact that the plaintiff did not inform the defendant that he had summoned these witnesses was of no importance. If the defendant desired any information as to the amount of the plaintiff's cost from him, he should have enquired, for he knew a suit had been brought and some costs had accrued, and if he chose to make a tender without enquiry, the plaintiff certainly was not in fault. Whether if he had enquired of the plaintiff as to his costs, the plaintiff would have been bound to inform him, it is not necessary now to decide. As the plaintiff's

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costs were peculiarly within his knowledge, there would seem to be some reason for requiring him to give information as to what costs he claimed, if information was asked of him.

The case cited from Maine, 2 Fairf. 258, where it was held that a tender of the full amount of a debt could not be avoided by the plaintiff by showing that he had previously procured a writ to be made on the debt, of which the debtor had no knowledge, and which the plaintiff did not disclose when the tender was made, but refused the tender on other grounds, is not at all in opposition to our views. The court very justly held that if the plaintiff claimed pay for his writ, he should have told the defendant he had one, and that his silence was a waiver of costs.

The only remaining exception, that is now insisted upon, is that the court did not direct a verdict for the defendant, on the issue made on his plea of tender of amends. The defendant pleaded that he tendered the plaintiff twenty-seven dollars, which was sufficient to cover his damages and costs. The plaintiff's replication traversed the making of the tender. There seems to have been no question made on the trial but that the defendant did properly tender to the plaintiff twenty-seven dollars, as stated in the plea, but the whole inquiry on this issue was whether that sum was sufficient to cover the damages the plaintiff was entitled to, and the costs then accrued, and as the jury found it did not, they found that the defendant did not tender sufficient amends. The defendant now claims that as the plaintiff traversed the making of the tender and not its sufficiency, a verdict should have been taken on that issue in his favor, as he proved the making of the tender as pleaded. We do not find in the exceptions that the court were asked to give any such direction to the jury, or that any exception was taken thereto, which is enough to dispose of the question here.

This case has, however, called our attention to the act of 1856, under the provisions of which this tender was made, and, as this is the first time this statute, or any practice under it, has been before the court, we have given it some attention, and deem it advisable to state our views of its meaning.

We are of opinion, that a tender made under this act is not the subject of a plea in bar of the action, nor a matter to be

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tried by the jury at all. The only effect to be given to the tender is upon the costs of the suit, and this is wholly left in the discretion of the court. The statute does not provide for pleading the tender, or for giving it in evidence on the trial, nor for the jury giving any verdict upon it. The plaintiff is to have his damages found by the court or jury who try his case, and then the effect of this tender is left wholly to the court. If the sum tendered is equal to the damages found, and the costs accrued when the tender was made, still if the court are of opinion that the defendant "did not act in good faith in the matter complained of," they may allow the plaintiff all his subsequent costs. If the court are of opinion that the defendant did act in good faith, and the tender is sufficient in amount, then the court are to disallow the plaintiff's subsequent costs, and allow or disallow the defendant's subsequent costs according to their discretion. If such tender can be pleaded in bar of the action, and if found by the jury sufficient to cover the plaintiff's damages and costs then accrued, and a verdict be returned for the defendant, it seems a little difficult to see how the court, if they think the defendant did not act in good faith, are to render a judgment for the plaintiff for his damages and costs, or how they could consistently deprive the defendant of his costs against the plaintiff.

It is apparent to us that the object of the statute was to enable the defendant in such cases to pay money into court, to answer the plaintiff's claim, and to give the court a very extensive discretion in relation to costs, to meet the peculiar circumstances and equities of every case.

The defendant in this case made no objection to the course taken in the court below, and took no exception thereto, nor do we see that his rights were in any manner prejudiced thereby.

The judgment is affirmed.

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SENECA SMITH v. THE ESTATE OF DELIVERANCE ROGERS,
deceased, testate.

Consideration. Statute of Frauds. Interest.

The receipt by one person of the property of another, for the purpose of paying the latter's debts, constitutes a sufficient consideration for a subsequent promise by the former to a creditor of the latter to pay his claim.

The testator had received from R. a transfer of the latter's property, and had also brought a suit against R. and attached the same property. The plaintiff, a creditor of R., claiming that the testator had received R.'s property without consideration, and that he had no debt against R., procured a writ in his favor against R., in order to attach the property so transferred and to summon the testator as R.'s trustee. Before this writ was served the testator told him that if he would hold on he would pay him his claim against R. The plaintiff, in reliance upon this promise, forbore to have his writ served, and the property was sold upon the testator's execution. *Held*, that the testator's promise was based upon a sufficient consideration, and that it was an original undertaking and not within the statute of frauds.

After the promise the plaintiff, by the testator's direction, took notes to himself from R., for his debt, payable with annual interest. *Held*, that, notwithstanding this, the plaintiff, as against the testator, was only entitled to simple interest upon his debt against R.

This was an appeal from the decision of commissioners upon the estate of Deliverance Rogers. The case was referred, and the referee reported the following facts :

On the 16th of November, 1846, one Randall was, and had for several years previously been, in the occupancy of a farm in Derby, belonging to the testator, Rogers, upon shares. Randall had upon the farm at that time, stock and property to the value of about fourteen hundred dollars, in which Rogers had some interest, to the amount of one-half or more. At this time Randall was indebted, among other creditors, to the plaintiff Smith, on book. At this time Randall executed a note to Rogers for three hundred dollars, whether with, or without consideration, or full consideration, did not appear. Rogers at that time claimed before the note of three hundred dollars was executed, that Randall owed him about eighty dollars ; that Randall was indebted to him ; and it then appeared that he was owing many others ; but they did not make any settlement of their

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matters in the presence of any person ; and the three hundred dollar note was made and signed privately between Rogers and Randall ; and the note was, after its execution, delivered to Randall to be taken back to Danby, from Granville where the said Rogers resided.

On the 17th of November, 1846, Rogers commenced a suit in his favor against Randall, and duly attached all of Randall's property.

On the same day of the attachment thus made by Rogers, and after it had been made, the plaintiff procured a writ of attachment on his debt against Randall, upon which was a trustee process, summoning Rogers as trustee of Randall, for the purpose of attaching Randall's property subject to Rogers' attachment ; but before any attachment had been made, or any further proceeding had in Smith's attachment, Smith asked Rogers if he was going to pay the plaintiff's debt against Randall. Smith said to Rogers, that there was property enough to pay Randall's debts, and that he was satisfied that Randall did not owe Rogers more than a trifle ; and that, if Rogers was not going to pay his debt, he should himself attach the property, and see how it was ; Rogers replied that he was going to see about it ; and said, " friend Smith ; hold on ! make no cost, I will see thee again before the sale of the property on the attachment. I shall do right about it."

After the attachment was made by Rogers, Randall confessed a judgment, and Rogers took out an execution on the judgment, and delivered the execution to the constable ; and Randall's property so attached on the original process, was advertised for sale on the 2nd of December, 1846.

On the day of the sale of the property, but before the sale, Smith asked Rogers how he found things. Rogers inquired of Smith, what was the amount of his debt against Randall. Smith examined his books, and told Rogers that it would not exceed \$150; and it might be less. Smith showed some of the charges for property that went on to the farm, and said to Rogers that there was property enough to pay all of Randall's debts, and leave something for Randall. Smith then went into an estimate of the value of the property of Randall, and the amount of Randall's

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indebtedness. After the conversation Smith asked Rogers if he was going to pay the plaintiff's debt against Randall. Rogers replied that there was property enough, if it was not eaten up in costs, in his hands for that purpose, to pay all of Randall's debts; and that if Smith would hold on, he would pay him the debt due him from Randall. Smith then said that all he wanted was his pay; and then directed the officer, who had his attachment against Randall, and was then present, not to serve the writ against Randall. Smith made no further efforts to collect or secure his debt against Randall, by reason of this promise of Rogers.

The property of Randall was sold on Rogers' execution, on the 2nd of December, 1846, without further costs or expenses, and was purchased in for the benefit of Rogers, at less than its real value, and was afterwards used and disposed of by Rogers. Some time after the sale of the property, Rogers told Smith to settle with Randall, and take his notes in small sums payable in yearly payments, which the plaintiff did, making the notes on annual interest.

Smith retained these notes in his possession, and never received payment of them, or the debt for which they were given, and did not present them to Rogers in his life time.

The referee reported that if, from the foregoing facts, the plaintiff was entitled to recover against the estate of Rogers, in that case he found that he should recover two hundred fifty-six dollars and twenty cents, being the amount of the notes above mentioned, and annual interest to the 12th of March, 1861.

Upon this report the county court, at the March Term, 1861, KELLOGG, J., presiding, rendered judgment *pro forma* for the plaintiff, to which the defendant excepted.

Linsley & Prout, for the defendant.

E. Edgerton, for the plaintiff.

POLAND, CH. J. The facts reported by the referee, are exceedingly vague and uncertain, but this is probably to be

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accounted for by the antiquity of the transaction, and the decease of Rogers, one of the parties to it, rather than from any fault of the referee.

The referee distinctly finds and reports that Rogers promised to pay the plaintiff's debt against Randall.

The counsel for the defendant claims, that this promise can not be legally enforced for two reasons.

1st. Because not founded upon any sufficient consideration.

2nd. That it was a promise to pay the debt of another, and therefore invalid by the statute of frauds.

The facts reported have some tendency to show, that the property of Randall went into the hands of Rogers upon an understanding between them that Rogers, out of the avails, should pay Randall's debts, and that the amount of the property largely exceeded any just claim that Rogers himself held against Randall.

It Rogers received property of Randall for the purpose of paying his debts, and afterwards, in consideration of having such assets in his hands, expressly promised the plaintiff to pay his debt, such promise was supported by the consideration of having received funds of Randall for that purpose; *Wait v. Executors of Wait*, 28 Vt. 350; *Merrill v. Englesby and Trustee*, *Ib.* 150.

If the facts reported are not sufficient to show that Rogers received Randall's property under an agreement between them that he was to apply it in payment of Randall's debts, then the tendency of the facts found, is toward the conclusion that Rogers was endeavoring to cover up Randall's property and keep it away from his creditors, and that Randall gave Rogers a note for more than he was justly indebted to him, confessed a judgment upon it immediately, and Rogers caused his execution to be levied upon all Randall's property, which was of a much greater value than the amount of the judgment. If Rogers purposely took Randall's note, and a judgment upon it for a greater amount than was justly due to him, for the purpose of covering his property against his other creditors, such judgment was fraudulent as to the creditors, and they might contest it by

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attaching the same property he had levied upon, or in various other modes.

The plaintiff claimed to Rogers that this was the case, and had procured a writ against Randall, for the purpose of attaching the property of Randall, and also summoning Rogers, as Randall's trustee. The plaintiff had certainly the legal right to institute such legal proceedings to contest Rogers' judgment, and endeavor to enforce payment of his debt against Randall. In this state of things Rogers told the plaintiff that Randall's property was sufficient to pay all his debts if it was not eaten up in costs, and that if the plaintiff would hold on, he, Rogers, would pay the plaintiff's debt. The plaintiff thereupon said that was all he wanted, and directed his officer, who was present, not to serve his writ, and Randall's property was all sold on Rogers' execution, at less than its value, and went into the hands of Rogers, and was disposed of by him.

It is clear that this surrender and forbearance by the plaintiff of his legal right to contest the validity of Rogers' judgment, and to obtain Randall's property for the payment of his own debt, at the request of Rogers, was a sufficient legal consideration to sustain Rogers' promise to pay Randall's debt to the plaintiff. This forbearance of the plaintiff might be an injury to the plaintiff, and was apparently clearly for the advantage of Rogers. If the plaintiff did not succeed in establishing what he claimed, and thus succeed in obtaining payment of his debt against Randall, Rogers, by his forbearing to attach the property, and trusteeing him, avoided the expense and vexation of a litigation of the matter.

Whether Rogers' promise to pay the plaintiff's debt against Randall, was founded upon the consideration that he had received property from Randall for that purpose, or upon the consideration that the plaintiff would forbear to attach the property, and allow him to have it disposed of upon his own execution, without question or litigation; we are of opinion that, under the decisions that have been made in this state, the promise must be regarded as an original undertaking by Rogers, and therefore not within the statute of frauds

Smith v. The Estate of Rogers.

The cases of *Wait v. Wait*, and *Merrill v. Englesby*, before cited, establish the principle that a promise to pay the debt of another in consideration of property placed in the promisor's hands by such debtor, for that purpose, is not within the statute.

In *Sampson v. Estate of Hobart*, 28 Vt. 697, it was decided that where one creditor promised to pay the debt of another creditor against their mutual debtor, in consideration that the latter creditor would forbear to sue and attach the debtor's property, but would allow the former to attach all the debtor's property on his debt, the promise was an original undertaking, and not within the statute of frauds, as a promise to pay the debt of another. In *Cross v. Richardson*, 30 Vt. 641, the plaintiff had attached certain property of Brown, his debtor. The defendant promised that he would pay the plaintiff one hundred dollars in part payment of his debt against Brown, in consideration that the plaintiff would release the property he had attached, which he did. It was held that this was not a promise to pay the debt of another, within the statute of frauds.

It is not needful now to go over the reasons for these decisions, as they will be found at length in the pronounced judgments in those cases, nor to again attempt the hopeless task of endeavoring to reconcile the numerous decisions on this much vexed subject, as we regard these cases as having settled the rule of decision in this state, and as fully covering this case.

The objection that the plaintiff subsequently took new notes of Randall for his debt, we think of no force, as the referee finds that this was done by the direction of Rogers.

In one respect the judgment below was erroneous.

The liability of Rogers to the plaintiff was fixed, when he made the promise. If he delayed making payment to the plaintiff, he would properly be held liable to pay interest on the amount of Randall's debt, but only for ordinary simple interest.

When the plaintiff took Randall's notes subsequently, he took them payable with annual interest, and the referee in finding the sum for which the defendant is liable, if so at all, computed the notes of Randall with the annual interest thereon. The plaintiff claims that he took these notes really as the agent of

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Rogers, and the interest the notes were to bear had nothing to do with the measure of Rogers' liability to him. It does not appear that Rogers gave any direction, or even had knowledge of how the notes were written in this respect. The judgment below included annual interest on Randall's notes, when it should have been, against this defendant, computed at simple interest only.

But as this is mere computation, it can be corrected here.—The excess of interest by this erroneous mode of casting is therefore ordered to be deducted, and the judgment affirmed for the balance.

As the defendant has succeeded upon his exceptions in lessening the amount of the plaintiff's recovery below, he will be entitled to his costs in this court.

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Pauper. Judgment.

It is not requisite to the validity of an order of removal of a pauper, and its binding force upon the town to which the removal is ordered to be made, that there be an actual removal of the pauper under such order.

It is a sufficient service of a notice of an order of removal if a certified copy of the same be left by an officer at the house of the usual abode of the overseer of the town to which the removal is ordered to be made, with a person of sufficient discretion then resident therein, even though the overseer never receives such copy, nor gets any actual notice of the proceeding.

The notice of the order of removal may be served upon the town to which the removal is ordered before the day fixed for the removal.

A valid order of removal of which notice is legally served on the town to which the removal is ordered, and from which no appeal is taken, is conclusive both as to the settlement of the pauper at the date of the order, and also as to all other facts necessary to uphold the order.

APPEAL from an order of removal of Rebecca Williams and

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her five minor children from the town of Poultney to the town of Sandgate, which order of removal was made December 24th, 1859. Plea that the last legal settlement of the paupers was not in Sandgate, on which plea issue was joined. The cause was tried by the court at the September Term, 1861, KELLOGG, J., presiding.

It was claimed on the part of the plaintiff that the said Rebecca was the wife of one Jacob Williams, who, it was conceded, was the son of one William Williams; and the plaintiff further claimed that William Williams had a legal settlement in Sandgate; that Jacob Williams followed and had the settlement of his father; and that Rebecca Williams, as the wife of Jacob Williams, followed and had his settlement. The defendant denied that the said Rebecca was ever lawfully married to Jacob Williams, or that they ever cohabited as husband and wife.

On trial, the plaintiff introduced a copy of a previous order for the removal of said Rebecca Williams, and her family, to wit: her three children,—Frances, Charles, and Egbert, from the town of Poultney to the town of Sandgate, as paupers, made on the complaint of the overseer of the poor of the town of Poultney, on the 11th of July, 1854, by two justices of the peace of the county of Rutland, and also the original complaint and warrant, with the return of service thereon, on which such order was predicated, as evidence in the case. This order of removal required the said Rebecca to remove, with her family and effects, from Poultney to Sandgate, on or before the first day of August, 1854. The defendant waived all objections to said complaint, warrant, and return, on account of the original papers, instead of certified copies of the same, being introduced as evidence; and all of the said papers were admitted under and subject to such other objections, as might be taken to the same, by the defendant. The copy of this order of removal had a warrant annexed to it for service on the town of Sandgate, pursuant to the provisions of the Compiled Statutes, p. 132, § 13; and the plaintiff then introduced in evidence the said warrant, and the officer's return thereon, dated 19th July, 1854, showing that service of the copy of the order of removal, and of such warrant, was made on the 19th July, 1854, by Ira M. Clark, as

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the constable of the town of Poultney, on Reuben T. Hurd, the overseer of the poor of the town of Sandgate, by leaving attested copies thereof, with the officer's return thereon, at the house of the usual abode of Hurd in Sandgate, with Mary Ann Monroe, a person stated in the return to be "of sufficient discretion," then resident therein. The defendant waived all objection to said warrant and return on account of the original papers, instead of certified copies of the same, being introduced as evidence, and the warrant and return were admitted subject to such other objections as might be taken to the same by the defendant. It was conceded by the defendant that Reuben T. Hurd was the overseer of the poor of the town of Sandgate, from March, 1853, until March, 1855. The plaintiff further claimed, that under, and by virtue of, this last order of removal, and the said proceedings thereon, the legal settlement of the said Rebecca became fixed and established in Sandgate, and that this fact, having been settled by a legal adjudication, and notice thereof, from which no appeal was taken, was no longer open to controversy between the parties. In reference to the service of the copy of this order of removal so made by Clark, the court found the following facts to be established by the evidence, viz.: Clark was constable of Poultney during the year next following the annual town meeting held in that town in March, 1854, and, as such constable, he held a warrant for the removal of the said Rebecca, pursuant to said order of removal, before and at the time she was therein ordered to remove as aforesaid; but he could not find her, so that he could execute the warrant, at any time within its life; and she was not in fact removed under this order. At the time of the service of the copy of this order of removal, and of the warrant thereon, Hurd boarded at the house of one Hoyt, in Sandgate. Clark, when he made this service, went to Hoyt's house, and found nobody there, except Mary Ann Monroe, who was then from twelve to fifteen years of age, and was employed as a hired servant in Hoyt's family, and some small children. Clark inquired of her for Hurd. She replied that he went away on that morning and was expected to return on that night, or the next day; and she also said that Hoyt and his wife were both away from home. Clark

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told her what his business was, and called for a pen and ink ; and she went and got the same for him ; and he then and there wrote his return of service on a copy of the order and precept, and left the copy with her, all as stated in his return, and requested her to deliver it to Hurd when he should return home, and she said that she would do so. She was then a "person of sufficient discretion" within the purview of the statute provisions relating to the manner of the service of writs of summons. But she never in fact delivered to Hurd the copy of the order of removal and precept, so left with her, nor gave him any information in respect to the same ; and Hurd never heard of the same until about three months before the trial in this case ; and there was no evidence in the case tending to show that any other officer of the town of Sandgate had any knowledge or information in respect to the said order of removal, or the service of the copy of the same, until after the commencement of the present proceedings.

In relation to the alleged marriage of Rebecca Williams to Jacob Williams, the court found that the ceremony of marriage was performed between them, by a Methodist clergyman, in Hampton, New York, a town adjoining Poultney, on the 20th of October, 1844, under such circumstances as the defendant claimed made the marriage invalid, but which circumstances, under the decision of the court, it does not become necessary to state. A few days after such ceremony and marriage, and before any cohabitation as husband and wife, or sexual intercourse had occurred between him and the said Rebecca, Jacob Williams absconded from Poultney, and has ever since resided in the state of New York. About two years afterwards the said Rebecca, having heard that the said Jacob was dead, and, also, that he had another wife living at the time of his marriage to her as aforesaid, and relying on the truth of these reports, was married at Middletown, Vermont, to one Kenyon ; and from that time Kenyon and she cohabited and lived together as husband and wife, until his death, which occurred in July, 1861 ; and Kenyon was the father of her five children, named in the present order of removal ; and each of these children was born after her marriage to Kenyon. After her marriage to Kenyon

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they resided in Middletown about three months, and after that resided in Poultney until removed to Sandgate in 1859, under the present order of removal.

The court decided that the last legal settlement of the said Rebecca was at the time of making the order of removal, appealed from, in the town of Sandgate, and rendered judgment for the plaintiff accordingly, to which the defendant excepted.

A. L. Miner and E. N. Briggs, for the defendant.

J. B. Beaman and E. Edgerton, for the plaintiff.

PECK, J. This is an appeal by the town of Sandgate from an order of removal of Rebecca Williams, a pauper, and her family of five children (named in the order,) from Poultney to Sandgate, made December 24th, 1859. Trial in the county court upon an issue of fact whether at the time of the order the last legal settlement of said Rebecca Williams was in Sandgate. The county court found the issue in favor of the town of Poultney, and rendered judgment accordingly. The facts are stated in detail, presenting a number of questions for the consideration and decision of this court.

To prove the issue the plaintiff introduced a previous order of removal of the same pauper, Rebecca Williams, from Poultney to Sandgate, dated July 11th, 1854, under which it appears that no actual removal was ever made, the officer not being able to find the pauper within the life of the warrant of removal, and from which order of removal no appeal was taken; and also the original complaint and warrant upon which said order was made, and the return of service, the defendant waiving all objection to this complaint, warrant, and return on account of the original instead of a certified copy being introduced, but not waiving any other objection thereto. This copy of the order has annexed to it a warrant or notice for service on the town of Sandgate pursuant to the statute of 1850 (Comp. Stat. p. 132, § 13,) with the return of service thereon, dated July 19th, 1854, by the constable of Poultney, by which it appears that he served it on Reuben Hurd, overseer of the poor

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of the town of Sandgate, on that day, by leaving a copy of the order and warrant, with his return thereon, at the house of the usual abode of said Hurd, in Sandgate, with Mary Monroe, a person of sufficient discretion, then resident therein. These papers were also introduced, subject to such objections as might be made to them, except on account of some of them being originals instead of certified copies. It was conceded by the defendant that Reuben Hurd was overseer of the poor of Sandgate from March, 1853, to March, 1855, and of course he was such at the time of the service of this order. The plaintiff insists that this order, made in 1854, served on Sandgate within thirty days after its date as above stated, and not appealed from, is conclusive that at the date of the order the pauper's settlement was in Sandgate, and that it entitles the plaintiff to recover, and so claimed in the county court, and that it precludes the defendant from showing that in fact she had not then and never had any settlement in Sandgate.

The defendant denies that it has such effect, and interposes various objections to these proceedings, from which it is claimed they are inoperative to fix the settlement in Sandgate.

1. It is claimed by the defendant's counsel that by the statute on this subject no order of removal can be made and served that will be binding upon the adverse town, unless an actual removal is made under it, unless it be in certain exceptional cases provided for by statute, as where the pauper is sick and unable to be removed, or is confined in jail, and then it is claimed the pauper must be removed as soon as a recovery from sickness or a release from confinement will permit. The defendant insists that there is no provision in the statute for serving the order or giving notice of it, except when there is an actual removal, unless the case comes under one of the exceptions above stated, and hence in this case insists that the justices had no right to issue the notice, and the officer no power to serve it. If this is the correct view of the statute, this objection is fatal. But such is not the construction of the statute. The act of 1797 was so in effect. That statute provided for an appeal to the next term, and was construed to mean the next term after notice of the order; but that statute provided for no other notice

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of the order of removal than the copy left at the time of the actual removal ; hence no appeal was allowed until the removal was made. But ever since the act of 1817 the law has been otherwise. That act provided that the town should give notice of the order by a copy of the order left with the town against which the order was made, within thirty days after the making of the order, and allowed an appeal to the term next after notice of the order. In *Strafford v. Hartland*, 2 Vt. 565, decided under the act of 1817, a copy of the order of removal was left with Hartland just before the December Term of the court, but the warrant of removal was not executed, or the paupers removed, till after that Term of the court, and not till the 27th of March following. Hartland appealed to the June Term, 1829, the next term after the removal, but not the next term after notice of the order, and the court decided that the appeal should have been taken to the next term after notice of the order, notwithstanding no removal had then been made, and dismissed the appeal as being taken too late. The statute now in force, and which is the same as the Revised Statutes, as to taking the appeal and delivering a copy of the order certified by the justices within thirty days is substantially like the statute of 1817, although not quite so explicit as to the time of taking the appeal. Comp. Stat. p. 132, § 12, provides that a copy of the order certified by the justices shall be left with the overseer of the adverse town within thirty days after the making of such order, unless such pauper shall be removed within that time. In *Braintree v. Westford*, 17 Vt. 141, the court put the same construction on the Revised Statutes as was put upon the act of 1817 in *Strafford v. Hartland*, above referred to, and dismissed the appeal because not taken to the next term after the copy of the order was served. In *Stowe v. Brookfield*, 26 Vt. 524, a copy of the order certified by the justices was delivered by a citizen of Stowe to the overseer of Brookfield, within thirty days after the date of the order, and no removal was ever made or appeal taken, and the court held the order binding on the town of Brookfield. In none of these cases does it appear that any reason was shown why a removal was not made when the order was served or copy left. This shows that the right and

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requirement to serve the order on the adverse town before making the removal, is not confined to cases where the pauper was sick or imprisoned. The actual removal of the pauper, therefore, under the order of 1854, is not necessary to its binding force.

2. The next question is whether the manner in which the service was made in this case is such as the statute requires.

Until the act of 1850 was passed, there was no mode of serving the order by sheriff or constable, by process directed to him to serve, except when actual removal was made, but the copy of the order was delivered by some private individual, and such delivery was proved by parol as any other fact in the case. But the act of 1850, (Comp. Stat. p. 132, §§ 13 and 14,) provides that the justices may certify a copy of the order, and append a notice, the form of which is given, directed to a sheriff or constable, and provides that it may be served by the sheriff of the county in which either town is situated, or a constable of either of said towns, as writs of summons are required to be served. This act only provides an additional mode of service. This order was served in the manner provided by this act as heretofore stated. But the parol proof shows that in fact the overseer never got actual notice until recently, and not in season to appeal, by reason of the person with whom the copy was left not delivering him the copy, although the court find she was a person of sufficient discretion. This want of actual notice must be regarded as the misfortune of the town on which the service was made. It can not be interposed to defeat the legal effect of the order and service, especially as it appears that the officer in good faith has done his duty, and fully complied with the statute. The proceedings can no more be attacked in this collateral way than could a judgment recovered under such a service of a writ of summons, had a similar accident occurred to the defendant.

3. It is further objected that the service of the order could not be legally made until the day arrived, fixed by the order for the pauper to remove. It is true that the pauper can not be removed before that time, but the order may be served immediately without reference to that, as we have already seen that the service of the order may be a separate proceeding.

4. The defendants object also that the order itself is invalid,

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and we are referred to the original papers put into the case as before stated. It will be noticed that the bill of exceptions does not state that the original order was put in; it states that the plaintiff put in the original complaint and warrant. Upon that is this entry:—"July 11, 1854, considered by the court that the within named Rebecca Williams and her children, Charles, Frances, and Egbert, be removed from the town of Poultney on or before the 1st day of August next." If no other order than this was made, it probably would be held invalid. It does not state to what town the pauper was ordered to be removed, nor is there any finding that her legal settlement is in Sandgate, nor that she is chargeable, or liable to become chargeable, to the town of Poultney. To be valid, it must find all that the statute requires to justify the removal. But from the whole proof we can not intend that this is the only record of the order; it must be regarded as a mere memorandum from which the order was ultimately made. The legitimate evidence is a certified copy of the order, and this the plaintiff did introduce, and it contains all that the statute requires, and is in due form. This is sufficient proof that there was an original, of which that is a copy. This defective order or memorandum is not shown by the exceptions to have been put in as the original order, it appears upon what the exceptions show the defendant put in as the original complaint and warrant and return. The copy of the order must be regarded as proof of an original of which that is a copy and which is perfect.

The order of removal in 1854 being valid, and the service thereof on Sandgate being regularly made, and no appeal being taken, that proceeding is conclusive of the settlement of the pauper in Sandgate at the date of that order. This is fully settled by the decisions above referred to, as well as others that might be cited. The case of *Stowe v. Brookfield* is directly in point. In that case the order was made and served, and no removal ever made under it, and no reason shown for not making the removal. The pauper at the time the second order was made, and which was appealed from, had resided seven years in Stowe continuously, and supported himself, but during the period of this residence the first order was made and served.

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The court held that the order was conclusive evidence that at the date of the order the settlement of the pauper was in Brookfield, and that the term of residence prior to the first order could not be added to the residence between the first order and the one that was appealed from to give a settlement in Stowe. This covers the whole ground of the present case.

5. But the defendants' counsel claims that, upon the facts stated in the exceptions, the marriage of Rebecca, the pauper, to Williams, in 1844, was invalid, and that therefore her marriage to Kenyon in 1846, by whom she had the children named in this order, and with whom she was living at the time the order was made in 1854, was valid, and therefore the justices had no power to make that order, even if her settlement was in Sandgate, for the reason that she could not be separated by a removal under it from her husband. But the answer to this objection is that if these facts constituted a valid objection to the making of the order of 1854, the adjudication of the justices is as conclusive against these facts as of the settlement, or of any other facts which the justices must have found to warrant the making of the order, as the adjudication is conclusive of every fact necessary to uphold it, and if on the other hand these facts constitute no objection to the making of the order, but only suspended the right to make an actual removal under it, still the order is conclusive of the settlement in Sandgate, which is the only issue presented by the pleadings in this case, and these facts in this view are immaterial. These facts can not be urged either against the order in 1859, from which this appeal was taken, or against the removal under it, as the only issue presented by the pleadings is upon the question of settlement of the pauper in Sandgate.

This conclusion on this branch of the case renders it unnecessary to pass upon the various points arising upon the evidence upon the question whether, independently of the order of 1854, the legal settlement of the pauper was in Sandgate at the date of this order made in 1859, as the order of 1854 precludes the town of Sandgate from entering into that inquiry, unless proof of facts which show a change of settlement since the order of 1854.

The judgment of the county court is affirmed.

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CYNTHIA S. MALLORY v. BERIAH N. LEACH.

Variance. Pleading. Evidence. Fraud. Contract.

In an action on the case by the seller of property for fraudulent representations and concealment by the purchaser in regard to its value, the price paid was set forth in the declaration less than it was proved on trial to have actually been. *Held* to be no variance.

The defendant sold the plaintiff certain stock, and executed to her at the time a written contract that he would repurchase it, if she desired, after a certain time at a stipulated price, and he afterwards did repurchase it at such price. *Held*, in an action by the plaintiff for fraudulent representations and concealment by the defendant in regard to the value of the stock, in connection with its repurchase, that parol evidence of what was said between the parties at the time the written contract was made, was admissible for the purpose of showing such a confidential relation of the parties, as rendered fraudulent the course of the defendant in making the repurchase.

Held, also, that if the defendant was aware that the plaintiff placed confidence in him to inform her fully of the value of the stock, and acted in reliance upon his representations in regard to its value at the time of his repurchase of it, and if this confidence was solicited by him, it was fraudulent in him to purchase it of her without communicating to her all the material knowledge he possessed in regard to it.

The defendant, being desirous of purchasing certain stock of the plaintiff, of the value of which he knew she was ignorant, for the purpose of misleading her and inducing her to sell the stock at less than its value, told her of a fact calculated in itself to depreciate the value of the stock, but omitted to disclose other facts within his knowledge which would have given her correct information of such value, and by this course succeeded in obtaining the stock at much less than what it was worth. *Held*, that the course of the defendant, under the peculiar confidential relations subsisting between the parties, was fraudulent and actionable.

The allegation of only a part of the truth, with the view of deceiving the other party, and inducing him to act differently from what he otherwise would, is equivalent to a false representation, and will avoid a contract thereby induced. ALDIS, J.

A party to a contract has a right to rescind it on account of the fraud of the other party as soon as he discovers the same; but if he elect to proceed and take his rights under the contract, he may still maintain an action against the other party for the damages occasioned by his fraud.

CASE. The declaration set forth that the plaintiff was the owner of fifty shares of the capital stock of the Franklin

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Mining Company, of the true value and situation whereof she was ignorant, and had no means of accurate information, and that the defendant undertook, at her request, to ascertain and communicate to her the value of such stock; that said stock was worth thirteen hundred dollars, which the defendant ascertained, but that he, contriving and intending to defraud the plaintiff, and to obtain said stock from her at much less than its just value, did not communicate to the plaintiff or inform her of its true value or the facts in relation thereto, but fraudulently concealed and suppressed the same, and fraudulently induced the plaintiff to believe that the said stock was of much less value than it really was, and also falsely represented that the same was of much less value than it really was; and also falsely represented that the same was about to be subject to a large assessment, when in fact, and as the defendant well knew, said assessment was only two dollars upon a share; that by means thereof the defendant then and there induced the plaintiff to transfer to him (and for his benefit,) the said stock for the sum of two hundred and seventy-five dollars paid her therefor by him, being much less than its real value as aforesaid; that the plaintiff believed and relied upon said representations, and was wholly ignorant of the facts so concealed and suppressed by the defendant as aforesaid, and of the true value of said stock, and supposed that the defendant had fully communicated to her his knowledge on the subject; and that she therefore did transfer said stock to the defendant, and for his benefit, for said last mentioned sum and no more; and that the defendant received and converted the same to his own use, and immediately sold the same for the sum of thirteen hundred dollars; and that thereby the plaintiff took the whole value of said stock over and above the sum of two hundred and seventy-five dollars, to wit: ten hundred and twenty-five dollars.

The defendant pleaded the general issue, and the cause was tried by jury at the September Term, 1860, PIERPOINT, J., presiding.

On trial the plaintiff gave evidence tending to show that in December, 1857, the defendant, who had in his hands two hundred and seventy-five dollars of the plaintiff's money, told the

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plaintiff that he owned about six hundred shares of the capital stock in the Franklin Mining Company, (a company incorporated in the state of Michigan,) which stock was guaranteed to him, and proposed to the plaintiff to appropriate the money then remaining in his hands, belonging to her, in the purchase of fifty shares of the capital stock of the company, for her benefit; that he said the company or Messrs. Palmer would guarantee that the stock would pay twenty per cent. for two years, and at the end of that time they would take back the stock at the price paid for it, and the twenty per cent. added if the purchaser preferred to take that rather than keep the stock, and that he would give her his individual guaranty to the same effect; and that he also told her he wanted to do something to make her independent, and he thought this would do it; also, that he had no doubt but the stock would increase in value so as to make her independent; and that being himself interested in the stock, he would keep the plaintiff informed as to the situation and value of the stock; and that he should go to the mines a year from next June; that upon the representations of the defendant, and without any knowledge of her own on the subject, the plaintiff concluded to take the stock, and soon afterwards the defendant sent for fifty shares of the stock, and obtained a certificate of the same, with the guarantee of Messrs. Palmer, as recited below, and delivered the same to the plaintiff, and thereupon executed his own written guarantee upon the back of said certificate, in the following terms:

“ MEMORANDUM.

NEW YORK, Dec. 22nd, 1857.

Sold to B. N. Leach of Middletown, Vt., Certificate No. 33 of ‘Franklin Mining Company,’ of the state of Michigan, being certificate for fifty shares in said Franklin Mines, issued originally to Charles H. Palmer. I agree for myself and for my brother, Charles H. Palmer, to re-purchase on the first day of July, 1859, the above described shares at the rate of seven and 70-100 dollars per share (on sixty days’ time) if the said Leach or the holder of this guaranty so desires.

N. G. PALMER, for himself and brother,
CHARLES H. PALMER.”

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" MIDDLETOWN, Dec. 29th, 1857.

I have this day sold the within described fifty shares of the Franklin Mining Company to Mrs. Cynthia S. Mallory of Middletown, Vt., and become surety to her for the faithful fulfillment of the guarantce of Charles H. & N. G. Palmer, so that in case they should fail to redeem their pledge to re-purchase, (if she so desires,) I hereby agree to take their place and to re-purchase said fifty shares of stock, at the rate therein specified, if Mrs. Mallory shall so desire.

B. N. LEACH."

The plaintiff's evidence further tended to show that the defendant requested the plaintiff to keep the transaction secret from all except her father and mother; and that the defendant paid for said fifty shares of stock \$275 and the interest thereon from July 1st, 1857, and that the plaintiff gave the defendant her note for \$6 to cover such interest, at the time the above recited contract was made.

The defendant's counsel objected to the admission of any parol testimony as to what was said by the parties relating to the transaction. The court admitted the evidence of what was said by the parties previous to, and at the time of, the making of the writing, as showing the situation and relation of the parties and tending to explain or give character to the subsequent acts of the parties relating to the stock in which it is alleged the fraud was committed.

It further appeared that in making the contract the plaintiff had the advice of her father, who was a man of intelligence and good business talent.

The evidence introduced by the plaintiff also tended to show that on the 30th of June, 1859, the defendant and the plaintiff's father met, and the defendant inquired of the plaintiff's father if he knew whether the plaintiff had decided whether to keep the stock or re-convey it to him, according to the terms of the contract, and in the course of the conversation the defendant said that he expected there was to be a large assessment on the stock that fall, and that he should have to pay about \$1100 on his stock; that in this conversation the defendant did not tell the plaintiff's father any thing about the real value of the stock, or

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say any thing calculated to put them on inquiry ; that the plaintiff's father said that he supposed that the plaintiff would elect to re-convey the stock ; that on the morning of the 1st of July, 1859, the plaintiff sent word by her father to the defendant that she had concluded to have him take back the stock ; that in the afternoon of the same day the defendant called upon the plaintiff, and the plaintiff then informed the defendant that she had concluded to have him take back the stock according to the contract ; that the plaintiff made no inquiries of the defendant about the value or condition of the stock, and knew nothing of its value except what the defendant had said about an assessment upon the stock ; that the defendant then paid the plaintiff \$94.50, in money, and gave her his note for \$290.50, by consent of the plaintiff, payable in six months, which note has since been paid, making the sum of \$7.70 per share on said stock, amounting in the aggregate to \$385.00.

The plaintiff also gave evidence tending to prove that at the time of the re-transfer of the stock, and of the defendant's conversation with the plaintiff's father in relation to it, the stock was worth in market about \$1300 ; that the defendant was aware of it, and intentionally concealed it from the plaintiff ; that the plaintiff did not know any thing about its value, but relied on the previous undertaking of the defendant to inform her in relation to it.

It further appeared that the defendant at the time he took the conveyance of the stock from the plaintiff, knew that it was quoted in the public newspapers at \$22.00 per share, but had no other information than what he derived from the newspapers, that such quotation was correct, and the defendant supposed it to be so, and that he said nothing to the plaintiff about the value of the stock. It further appeared that the plaintiff learned of the true value of the stock about two weeks after she re-conveyed the same to the defendant, but that she did not thereafter express any dissatisfaction to the defendant personally, nor offer to rescind her contract of re-conveyance ; and that when the defendant's note of \$290.50 matured, she received payment of the same without objection, but had no personal communication with him in relation to the matter.

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The defendant introduced testimony on his part tending to show that in the course of his conversation with the plaintiff previous to the making of the written contract above recited, he incidentally expressed his intention of going to the mines a year from the next June, and that if the stock did not turn out as well as he had anticipated, he would inform her, and that he gave her no other or further assurance either as to going to the mines, or keeping her informed as to the situation and value of the stock; that soon after the contract was made, the plaintiff, by reason of improper influences from third persons, became alienated toward the defendant, and lost confidence in him; that the plaintiff never afterwards enquired of the defendant about the value or condition of the stock, and did not, at the time she transferred the stock to the defendant, make any inquiries about its value; that the defendant had never been to the mines, and that in all the representations made by him before and at the time of the contract, and in the procuring of said stock for the plaintiff, the defendant acted in entire good faith, and that there were good and satisfactory reasons, as both parties understood at the time, for keeping the transaction secret; that he knew the value of the stock at the time of the re-conveyance; that he did not inform the plaintiff, and had no reason to suppose she knew it; that when he informed the plaintiff's father about the proposed assessment, he had been informed and believed that there was to be an assessment upon the capital stock of the company, and that in point of fact an assessment of two dollars on the share was made soon after the re-conveyance of the stock by the plaintiff to the defendant, and that the assessment on the defendant's original stock amounted to twelve hundred dollars; that he did not allude to the subject matter of an assessment upon the stock, until after the plaintiff's father had informed him that the plaintiff would probably elect to re-convey the stock to the defendant; that he had no other information about the value of the stock at the time of the re-conveyance of the same to him by the plaintiff than the stock quotations contained in the public newspapers, and that about forty of these papers were taken and distributed in the town of Middletown, where the plaintiff resided; but it did not appear that either the plaintiff or her

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father took or even saw any of those papers. The plaintiff testified that she did not, and also that about four months after the plaintiff purchased said stock of the defendant, he advised her to hold on to it, as he thought it would make her independent.

After the close of the evidence, the defendant's counsel claimed, and requested the court to charge the jury:

1. That the evidence in relation to the contract varied from the allegations in the declaration, and that therefore the plaintiff could not recover:

2. That the contract in writing controlled the transaction, and that no obligation existed upon the part of the defendant beyond what was contained in the written contract, or imposed by it. And that if the plaintiff elected to re-convey the stock and receive the premium provided by the contract, no fraud could be imputed to the defendant:

3. That in order to create a liability on the part of the defendant, it was incumbent upon the plaintiff to make out that the defendant was guilty of some fraud by means of which the plaintiff was induced to re-convey to him the stock. And that as it was conceded that the defendant made no representations, either before or at the time of said transfer, that were not in point of fact true, no recovery could be had for false representations. And that a mere failure on his part to disclose any knowledge or belief that he might have had of the value of the stock, could not amount to a fraud for which a recovery could be had, if no inquiries were made of him for information.

4. That the defendant being under obligation to take the stock at the price specified in the contract, if the plaintiff so elected, and she having so elected without making any inquiries of the defendant as to its value, no fraud could be imputed to the defendant growing out of the voluntary performance on his part of a contract she has the right to enforce.

5. That fraud can not be predicated upon representations that were true; and that if the defendant represented that an assessment was to be made upon the stock, and the assessment was actually made as represented, no recovery could be had by reason of such representation.

6. That if the plaintiff, after having ascertained the real

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value of the stock, failed to repudiate the contract of re-conveyance, but retained the note that the defendant gave her, without offering to rescind, and finally received her pay upon said note without objection, at or about the time it matured, it would constitute a ratification of the contract of re-conveyance, and a waiver of any supposed claim she might have had, even if the transaction were in itself fraudulent.

The court declined to charge as requested, but charged the jury in substance, and among other things not objected to, as follows :

That the rule of law is not settled that the vendee of property is bound to communicate all the knowledge he possesses as to the character and condition or value of the property he purchases ; but that he is bound not to make any false representations as to the property, to induce the owner to sell it for less than he knows it to be worth ;

That if there was nothing between the parties to this suit except that the defendant proposed to re-purchase the stock, he would not be under obligation to give the plaintiff any information as to the value of the stock ; and that if the defendant took back the stock on the original agreement between the parties, he at the time knowing what the market price was, still he was not bound to make that market price known to the plaintiff, but if the defendant said anything with a view to mislead the plaintiff as to the value of the stock, and induce her to sell the stock at a price less than its value, and she relied thereon and was deceived thereby, he would be liable in this action, unless he disclosed all his knowledge of its value ; that if he told her facts calculated to depreciate its value, he must also communicate all the facts within his knowledge tending to enhance its value :

That if the defendant, with a view to induce the plaintiff to sell him the stock, represented that a large assessment was to be made upon said stock, he at the same time knowing the stock to be worth much more than he was to pay for it, he was bound to communicate to the plaintiff such information as he possessed in relation to the value of the stock, although the representation he did make was in point of fact true ; that if the defendant said what was true, and at the same time knew that the market value

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of the stock was much more than he was to pay, he would be liable in this action if he did not tell the whole truth; that a man may commit a fraud in telling the truth, if in stating the truth he intends to deceive another, and states it in such a manner as to deceive that other; and that this depended upon the intent with which the communication was made:

That, as by the evidence in this case it was no part of the original agreement or contract that the defendant was to give the plaintiff any information in relation to the stock, no obligation existed by virtue of the written contract to impart such information; but that if, at the time the written contract was made, the defendant told the plaintiff that he would inform her of the situation and value of the stock from time to time, and the plaintiff relied upon such promises, and the defendant obtained information relating thereto, he would be bound to communicate that information to her before he purchased back the stock, especially when the circumstances were such that he supposed she was acting in ignorance of it, because he had placed himself in such a relation that it would be a fraud if he received back the stock without giving her the knowledge he possessed; that the defendant should not have suffered the plaintiff to mislead herself by so conveying the stock to him under such circumstances that the inference would be irresistible that she would not have sold the stock for three hundred and eighty-five dollars, when it was worth nearly twelve hundred dollars; that if the defendant did agree to give her such information, and had reason to believe that the plaintiff did not know what the real value of the stock was, he was bound to communicate it; that in determining whether fraud was committed or not, the jury were to find whether the defendant did agree to give information as to the condition of the stock; and if the defendant did so agree and had information and failed to communicate it, it was such a fraud, under the circumstances of the case, as would entitle the plaintiff to recover; that an incidental remark that the defendant was going to the mines, and that if the stock did not turn out well he would inform her, &c., as stated in the defendant's testimony, would not be sufficient to make the defendant liable.

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To the admission of the evidence objected to, to the refusal of the court to charge as requested, and to the charge of the court as made, the defendant excepted.

D. Roberts, E. N. Briggs and D. E. Nicholson, for the defendant.

Linsley & Prout and E. J. Phelps, for the plaintiff.

ALDIS, J. I. As to the alleged variance, it may be observed that it consists in averring the injury occasioned by the plaintiff's fraud to be greater than it was proved to be. But in the averment of damages it is not necessary to be exact; and the proof need not sustain the allegations in this respect.

II. The parol evidence was admissible as tending to show the fraud—not as qualifying the written contract. It tended to show a special confidence and relation between the parties, in regard to this business, and, if proved, to the satisfaction of the jury, to have existed in the outset, and to have continued to the time of the re-purchase by the defendant, must materially have given character to both the defendant's words and silence, as intended to induce the plaintiff to act under a delusion. This leads us to the main point, viz.: the testimony on the part of the plaintiff, and the charge of the court in regard to it.

The testimony of the plaintiff tended to show, that the defendant, in advising her to buy the fifty shares of mining stock, professed to act as her friend, from a desire to invest her money so as to make her independent, and in a mode that was to be kept secret from all but her father and mother, and with his own guarantee that she should get back her money and at least twenty per cent. interest. He told her that as he was interested in the stock he would keep her informed as to its situation and value, and that he should go to the mines in June, 1859. This declaration of the defendant is to be considered in connection with the fact that by the written contract she was to decide on the 1st July, 1859, to keep or to sell her stock. That such language would strongly tend to beget confidence and trust in the defendant, and lead the plaintiff to rely upon his advice, and to be

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guided by it on his expected return from the mines in June, 1859, is obvious. This must have been the purpose for which he thus advised her; and we think he must have been aware of the effect that it produced on her mind at that time. Now if this relation of trust and confidence continued from December, 1857, when she bought the stock, to July, 1859, when she sold it to the defendant, and he at the time of his purchase knew that she thus trusted in and relied upon his friendship and advice in this matter, it was clearly his duty to tell her of its real value, and it was a fraud to take advantage of her ignorance and buy it at about a quarter of its market price. But if during this period of time this relation of confidence ceased to exist, and alienation and distrust had taken its place, then it is obvious that he could not have supposed she was relying upon his friendship and advice in this business, and was not under obligation to give her information in regard to the value of her stock.

There was testimony on the part of the defendant tending to establish this state of facts. The fraud of the defendant (if any) consisted in taking advantage of the confidence which he knew the plaintiff put in him, and which he had sought to win; but if she had lost her confidence in him, he could no longer take advantage of it.

The court distinctly stated to the jury that no obligation rested upon the defendant by virtue of *the contract* to inform her of the real value of the stock. To have required that would have been to add a new clause to the contract. The court then proceeded to refer to those circumstances which gave rise to a relation of trust and confidence between the parties in this matter, and made it the duty of the defendant to inform her of what he knew as to the value of the stock, and then said to the jury, "because he had placed himself in such a relation it would be a fraud in him to receive back the stock without giving her the knowledge he possessed." This put the case clearly on the ground of fraud in taking advantage of a confidence he had sought, and which he knew was placed in him.

The doubt we have felt, in regard to the correctness of the charge in this respect, is whether the court sufficiently called the attention of the jury to the fact that this relation of confidence

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must exist between the parties at the time of the re-purchase by the defendant, and to those circumstances shown on the part of the defendant tending to prove that the relation had ceased to exist. We have carefully examined the exceptions on this point, and can not but regret that the statement in this respect is not more satisfactory. It does not appear that the defendant in his requests to the court called their attention to this part of the defence, or made any request in regard to it. The defendant's evidence was admitted. The court treated the promise of the defendant to inform her of the situation and value of the stock from time to time as a continuing promise, and seem to carry the idea that the plaintiff must have continued to rely on it. As there is no direct request to charge in regard to this part of the defence, and as no exception was taken on the ground of an omission in this respect; and as it would have been the duty of the defendant to have called the attention of the court to this point, if not sufficiently referred to in the charge, and as the general tenor of the charge seems to require that the confidence should have existed at the time of the re-sale, we think we should not be justified in opening the case on this ground.

The defendant further claims that the charge of the court in regard to the representation made by the defendant, that there was about to be a large assessment made upon the stock, was incorrect. The substance of the charge is,—if the defendant said this with a view to mislead the plaintiff as to the value of the stock—if the fact was calculated to depreciate its value and to induce her to sell at a price less than the value, and she was thereby deceived and induced to sell, he would be liable unless he disclosed his knowledge of facts tending to enhance its value.

1. This does not assume as matter of law, that the fact would depreciate its value and induce her to sell. That question is left to the jury. It is obvious that ordinarily an assessment of 25 per cent. upon stock, unexplained, would lead the holder to suspect something might be wrong; especially if it was not expected by stockholders that such an additional payment was to be made. So if the holder of the stock was a poor person, and unable without trouble and inconvenience to raise the sum assessed, it

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would tend to induce such person to sell the stock. We think the evidence admissible as tending to show that the defendant made declarations which he must have been aware would embarrass the plaintiff and lead her to wish to part with her stock.

It was telling the truth, but not the whole truth. It was telling it in a manner to produce the effect of a falsehood. The defendant must have felt that what he said would depress the plaintiff's estimate of her stock—would lead her to think its value much less than it was; and he knew she was ignorant of its true value. Now he might be silent—might say nothing; but he had no right to produce a delusion by his language, and knowingly take advantage of it for his own benefit. This was not fair dealing, and was very properly characterized in the charge of the court.

III. It is further claimed that the receipt by the plaintiff of the amount of the note given for the stock, after she knew of the fraud, was a ratification of the contract, so that she can not now sue for the deceit.

Let us consider what the rights of the parties were when the defendant had by fraud procured a transfer of the stock to himself.

1. As to the defendant it is obvious that he could not take advantage of his own wrong—he could not rescind the contract, but was bound by it to pay the note.

2. As to the plaintiff, as fraud avoided the contract, she had the right, if she saw fit, upon discovery of the fraud, to treat the contract as wholly at an end—to return to the defendant his note and demand a re-conveyance of the stock. This would have been to rescind or disaffirm the contract. If she thought that the stock would continue to advance in value and remain a highly profitable investment, she might have deemed it for her interest to have back the stock; and, in order to accomplish this, she should have given notice immediately to the defendant that she disaffirmed the contract and demanded back her stock. But she was not bound to do this. She might claim what was due her by contract, and also rely upon her right to recover her damages for the amount of which she had been defrauded—which would be the difference between what the defendant had

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agreed to pay her for the stock and its true value. In such case she would have ratified the contract, but would not have thereby waived her claim to damages.

The fallacy of the defendant's claim is this: that it supposes a ratification of the contract to be a waiver of the right to recover damages. Not at all. The plaintiff has the right to hold the defendant to his contract, and, also, to recover of him compensation for the injury occasioned by his fraud. How can the defendant complain of this? It is but making the plaintiff good. It can not injure the defendant, or deprive him of any defence, or impair any right.

If the plaintiff had seen fit to rescind the contract, but had waited an unreasonable time before giving notice,—pondering upon the fluctuations and chances of the market before making a decision—the defendant might perhaps say with justice that such delay tended to deprive him of his reasonable opportunity to sell, and that he might well suppose she had concluded to ratify the sale and ask not for her stock, but only for damages. Her right to her damages was perfect when the fraud was committed. It is a right not legally to be extinguished but by compensation or by voluntary release. To infer a release of the damage from her receiving payment of the note would be putting an unreasonable construction on the act. She thereby takes what the defendant agreed to pay, and neither claims nor relinquishes her rights growing out of the fraud.

The case cited by the defendant from 9 B. & C. 57 only shows that though the vendor of goods sold through fraud and upon a credit might sue in trover for the goods before the credit expires, yet if he proceed upon the *contract* of sale he can not sue till the credit has expired. The principle of that case does not conflict with the plaintiff's right to recover his damages after receiving payment of the note. When he sues upon the contract he must be bound by it, but when damage results from the fraud beyond what he can recover by contract, he can also recover in an action on the case for the deceit.

In 2 Pars. on Contracts 278, in a note, it is said, "If a party defrauded brings an action on the contract to enforce it, he thereby waives the frauds and affirms the contract." The

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authorities cited to sustain this are 5 M. & W. 83, and 24 Wendell 74.

In *Selway v. Fogg*, 5 M. & W. 83, the action was assumpsit for work in carting away rubbish. The plaintiff, induced by the fraudulent representations of the defendant as to the depth of the rubbish, agreed to do the work for £15, which had been paid him. He sought by this action to recover for the value of his work above the £15. It appeared that the plaintiff had knowledge of the circumstances indicative of the fraud before the work was finished. Upon the trial, ABINGER, C. B., was of the opinion, that the question of fraud was not open to the plaintiff in the present action, although it might be the subject of complaint in another. Upon hearing in the Exchequer, ABINGER, C. B., said "a party can not be bound by an implied contract when he has made a specific contract which is avoided by fraud. If he repudiate the contract on the ground of fraud, as he may do, he has a remedy by an action for deceit." So far the opinion stands upon solid ground, and was required for the decision of the case. But when the Chief Baron proceeds to say "secondly, the plaintiff had full knowledge of all that constituted the fraud, during the work, and as soon as he knew it he should have discontinued the work and repudiated the contract, or he must be bound by its terms," if he means, that the plaintiff could not in such case recover for the damage he suffered from the fraud in an action for the deceit, he says what was not required for the decision, and what we deem untenable as a rule of law. Consider in what a position the plaintiff is put by the application of such a rule. He proceeds with his work till it is in part done, and then discovers "circumstances indicative of fraud." He may be fully convinced that he has been defrauded, and yet feel great doubt that he can prove it. He says to himself, "If I proceed and finish the work I shall be entitled in any event to the contract price. If I stop and fail to prove fraud, I can not recover for the work I have done. If I proceed and finish the work and still shall be able to prove fraud, why should I not be entitled to recover the full value of all my work; why should I be bound to a contract price to which my consent was procured through fraud? How does my going on with the work

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injure the defendant, or purge his fraud? If he has been guilty of fraud he knows it, and needs no notice from me to put him on restitution." If, however, the going on with the contract injures the defendant's rights, or puts him in a worse condition than he would be by rescission, then the plaintiff ought not to go on, but to stop and give notice. But the defendant can not justly claim it as his right, not to have the work done at all unless he can have the advantage of his fraud, and get it done for less than its fair value. When he agreed to have the whole work done, and decided to try to get it done for less than its value through fraud, he should have considered that the plaintiff might not discover the fraud till the whole work was done; or might, if he did discover it, doubt his ability to prove it, and so reasonably go on and finish the work; and yet, in either case, it would be flagrant fraud in him to pay only the contract price.

The S. & S. R. R. Co. v. Row, 24 Wend. 73, was where the defendant, before commencing the work, knew of the alleged fraud, and had all the knowledge as to the fact said to be misrepresented that the plaintiff had, and could not have relied on such representation. The court say, "if the truth had not been discovered till after the performance of the contract had been commenced, a different question would have been presented.

In *Kimball v. Cunningham*, 4 Mass. 502, the question was whether the defrauded party, who had affirmed the contract, could retain in his possession personal property, a part of the consideration, which by the contract was to pass to the other. *Held* that the contract, if affirmed, was affirmed as a whole, and that the defendant was liable in trover for the property so withheld. It also appeared in the case that the defendant had sued for his damages from the fraud in an action on the case. The court say, by this action it is clear he has made his election to consider the contract as subsisting, and to recover damages for the breach of it.

If so, the fraud was not waived in the sense of waiving the right to recover damages for it.

In *Campbell v. Fleming*, 1 Ad. & El. 40, the plaintiff sought in an action of assumpsit to recover the price he had paid for shares in a mining company which he had been induced to buy

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by fraudulent representations. After knowledge of the fraud he consolidated the shares with other property in a new company, and had sold shares in the new company. *Held*, that such sales of the new shares, after knowledge of the fraud, was an affirmance of the contract, so that he could not sue for and recover back his purchase money. The decision does not touch the point that he could not recover, in an action for the deceit, the damages he suffered by it.

The whole subject is well considered in *Whitney v. Allaire*, 4 Denio 554; and the court say: "There is no principle or authority showing that where a person has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with knowledge of the fraud, acquired subsequent to the making and previous to the performance, bars him of any remedy for his damages for the fraud. The party defrauded, by performing his part of the contract with knowledge of the fraud, is deemed to have ratified it, and is precluded thereby from subsequently disaffirming it. That is the extent of the rule. His right of action for the fraud remains unaffected by such performance. But having gone on after discovering the fraud, he can not afterwards disaffirm the bargain, or sue for the consideration." The principle and its reason apply to this case. Upon this subject see Long on Sales, 219, 240; 2 Kent's Com. 480; 3 Fost. 520; 10 Ind. 430; the remarks of SHERMAN, J., in 14 Conn. 424-5; 5 McLean 170; 9 Cush. 266.

Judgment affirmed.

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**D. A. VAN AMEE v. JACKSON & KETCHAM AND TRUSTEES
JAMES M. KETCHAM AND MARY KETCHAM.**

Trustee Process. Will. Settlement of Estate. Trust.

One can not be charged as trustee on the ground of having mere securities for money in his hands belonging to the principal debtor.

A note or bond given by a legatee to whom property was devised in trust to distribute it among the heirs of the testator, such note or bond being given for the distributive share of one of the heirs in such estate, and intended for his benefit, but made payable to another party, may be attached by the trustee process in a suit against such heir.

But where the trust under the will was merely to make such a distribution of the estate as should equal, having regard to the amount which each heir had previously received from the testator, and on this basis the heir, for whose benefit the bond was given, was not entitled to any distributive share, and there was no consideration for the promise except the parental affection of the legatee for the heir; *held*, that such bond, being given to another person in trust for the heir, could not be attached by the trustee process in a suit against the latter.

In construing precatory words in a devise the court will look at the circumstances existing at the date of the will, and, if necessary, will construe words importing a trust as mere expressions of recommendation or confidence. *KELLOGG, J.*

TRUSTEE PROCESS. The commissioner reported that Aaron J. Ketcham, one of the defendants, and James M. Ketcham, one of the trustees, were the sons of Barnard Ketcham, deceased, and of Mary Ketcham, the other trustee; that Barnard Ketcham devised by will all his property to his wife, Mary Ketcham, adding in his will that he did this "in the *belief* that the said Mary Ketcham *will* make such a distribution of my property among and between our children as will be just and equal (after keeping and using such parts thereof as she may want during her life time) according to the respective claims of our children, as she shall judge to be just and proper, and in accordance with what she knows to be my wish in the distribution of my property among my children; and it is my wish that the said Mary shall at such times as she shall deem it advisable, and after using all the property she may wish for her own comfort and support, provide for the distribution of all my property to our children,

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in a manner that shall be just and equal between them, having regard to such as may have received property from me, and other circumstances which should have an influence in the distribution of the property which I shall have at my decease."

The commissioner reported that Aaron J. Ketcham received from his father during his life time an amount of property greater than he would have been entitled in an equal distribution of his father's estate among his heirs, and was besides largely indebted to the estate; that Aaron J. Ketcham had failed previous to his father's death; that after his father's death, his mother, Mary Ketcham, who had taken possession of all her husband's estate as the sole owner thereof, made in 1859 a distribution of all the real estate, left by Barnard Ketcham, among the latter's heirs, except Aaron J. Ketcham; that about the time of this distribution she executed to James M. Ketcham a promissory note for about seven thousand dollars, conditioned that the avails should be applied by James M. Ketcham for the benefit of his brother Aaron, at his discretion; that this note was delivered to Aaron and retained by him until February, 1860, when he surrendered it to his mother, and took in its stead, and retained up to the hearing before the commissioner, a bond from her to James M. Ketcham and Phineas P. Vail, in trust for him, for \$8,500, to be paid to the obligees and to be held and invested by them for the use and benefit of Aaron J. Ketcham, and that this bond further provided that the obligees were to expend the annual income for the maintenance and support of the said Aaron, or at their discretion to pay the same, as it accrued, directly to him, and, if it could be done without risk, they were authorized at their discretion to pay over the whole sum to him in his lifetime, and upon his death to pay it to his legatees or heirs.

The commissioner further reported that both this bond and the note for which it was substituted, were made with the intent of providing for the support of Aaron J. Ketcham, and of doing so in such a manner that the fund should be beyond the reach of his creditors, and that there was no other consideration for the execution of the note and bond by Mary Ketcham, other than parental affection, unless there was such a trust created in her by the will of her husband as would compel her to make some

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provision for Aaron out of the estate of her husband in her hands as legatee.

The commissioner, upon these facts, decided that neither of the trustees were chargeable, and the county court at the September Term, 1861, KELLOGG, J., presiding, rendered *pro forma* the same decision, to which the plaintiff excepted.

E. June and Linsley & Prout, for the plaintiff.

E. Edgerton, for the trustees.

KELLOGG, J. The questions in this case arise upon exceptions by the plaintiff to the decision of the county court, adjudging that neither of the persons summoned as trustees were chargeable as the trustees of Aaron J. Ketcham, one of the principal defendants, on the facts which appear in the case. It is well settled that one can not be charged as trustee on the ground of having mere securities for money in his hands, (*Hitchcock v. Edgerton*, 8 Vt. 202; *Scofield v. White's trustees*, 29 Vt. 330,) and the application of this principle to the facts in this case leaves no ground upon which it can be claimed that James M. Ketcham is chargeable as the trustee of Aaron J. Ketcham; and the plaintiff does not now make any such claim.

● In respect to Mary Ketcham, the other trustee, it is claimed by the plaintiff that she should be held chargeable as the trustee of Aaron J. Ketcham, on the ground that the will of her husband, Barnard Ketcham, created a trust in her to make a distribution of the estate, which he devised to her, (excepting so much as should be necessary for her own support and comfort during her life,) among their children, of whom Aaron was one, and that the note which she executed to her son James M. Ketcham, mentioned in the report of the commissioner, with a condition that the avails should be applied by James for the benefit of Aaron, at his discretion, should be considered as having been executed in discharge of such trust and pursuant to the purpose expressed in the will of her husband, for the benefit of Aaron, and as his distributive share in her husband's estate. If her son Aaron was entitled to any share in his father's estate on the

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distribution of it by her pursuant to a trust created by the will for his benefit, there can be no doubt that it should be treated as becoming his property absolutely, and if this note was given for such distributive share, the fact that it was made payable to another party would not exempt it from attachment by trustee process as his property, while held by him or by the party to whom it was made payable; *Camp v. Scott*, 14 Vt. 387; *Marsh v. Davis*, 24 Vt. 863. The bond executed by Mrs. Ketcham to her son James and Phineas P. Vail as trustees for her son Aaron having been executed as a substitute for this note, her obligations arising from it should receive the same consideration which is applicable to her obligations arising from the note itself.

The will of Barnard Ketcham devised and bequeathed his entire property to his wife, "in the belief that she would make such a distribution of it among and between their children as would be just and equal, after keeping and using such parts thereof as she might want during her lifetime, according to the respective claims of the children, as she might judge would be just and proper, and in accordance with what she knew to be his wish and desire in respect to the distribution of his property among his children." The will then proceeded as follows: "And it is my wish that the said Mary shall at such times as she shall deem it advisable, and after using all the property she may wish for her own comfort and support, provide for the distribution of all my property to our children in a manner that shall be just and equal between them, having regard to such as may have received property from my property, and other circumstances which should have an influence in the distribution of the property which I shall have at my decease." The intention of the testator in respect to the ultimate distribution of his property among his children clearly appears to have been that the distribution should be equal between them, having regard to the amount which they each had respectively received from his estate and to such other circumstances as ought to be considered in connection with the distribution, and the whole matter is left to the judgment and discretion of his wife, as well in respect to the time of making the distribution, as to the amount which each one of his children should receive upon the distribution.

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There is no doubt that precatory words used by a testator in his will, or words expressive of hope, desire, or request, may amount to an imperative direction, creating a trust or beneficial interest in favor of the object of the trust; but, in giving a construction to precatory words in a devise, a court of equity will look at the circumstances existing at the date of the will, and, if necessary, will construe words importing a trust as mere expressions of recommendation or confidence; *Quayle v. Davidson*, 12 Moore P. C. C. 268; *Adams' Equity* 30, 31. Assuming that Mrs. Ketcham took the property of her husband, by virtue of the provisions of his will, under an obligation which amounted to a trust in favor of their children, it is clear that the will contains no certain declaration of the interests which the children were respectively to take, and that she had a trust with a discretion as to its execution; in other words the trust was rather a direction and a recommendation than a direct trust. She was the person upon whose judgment and discretion the performance of the trust depended, according to the plain intention of the testator. The equal distribution of the testator's property among his children must be considered the sole object of the trust, admitting such a trust was created by his will; and this distribution was to be made, by having regard to the amount which they had severally received from his estate, and such other circumstances as ought to be considered in determining the interests which the children were respectively to take upon the distribution. The commissioner reports that Aaron had received from his father in his lifetime an amount greater than he would have been entitled to in the equal distribution of his father's estate among the heirs of his father, and this fact is decisive against his right to claim any share or beneficial interest under the provisions of his father's will, and his creditors must stand upon the same rights which he would have against the trust property. It appears that he had not only received his full share of his father's estate at the time of his father's decease, but was in fact largely indebted to his father at that time, and that this indebtedness has never been paid. We think, therefore, that there is no ground upon which it can be justly claimed that the note which was executed by Mrs. Ketcham to her son James for

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Aaron's benefit was executed in performance of any trust created for his benefit by the provisions of his father's will; and we are satisfied that, in the distribution made by her of her husband's estate among her other children, she disposed of the same according to the wishes and intention of her husband, as expressed in his will. If this note was not executed in performance or satisfaction of a trust created by the provisions of her husband's will, it has no consideration to support it, and it was a gratuitous promise which could not be enforced against her as a legal obligation because of its lack of consideration. It is to be treated as a voluntary provision for Aaron out of her own property, and not from her husband's estate, and she had an unquestionable right so to bestow a gratuity or bounty which she destined for the support and benefit of her son as to place it beyond the reach of his creditors. The same reasoning will apply to the note executed by her husband to Aaron, which is mentioned in the commissioner's report. Neither of these notes possessed the character of a legal obligation, because they were destitute of a legal consideration to support them. Each was a mere mode of bestowing a bounty by a parent for the support of a son, and the creditors of the son have no right to complain that this bounty was intended by the donor to be made available to the son's benefit rather than to their own. The bond executed by Mrs. Ketcham to trustees for Aaron's benefit gave to Aaron no right to the money which she bound herself to pay by it until, in the judgment of the trustees, it could be paid over to him without risk of its being taken from him; and it would defeat the express purpose of the instrument to hold that the creditors of Aaron can, by the trustee process, attach this money as a debt due from her to Aaron. They stand in no better right in respect to this money than the right of Aaron himself, and his right is a qualified and not an absolute right to it; depending, as it does, upon the judgment and discretion of the trustees in respect to the time when it shall be made available to him.

We find, on the facts which appear in the case, no ground upon which Mrs. Ketcham can be held chargeable as the trustee of her son Aaron; and the judgment of the county court,

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(which was *pro forma*,) that neither of the trustees are chargeable as trustees of the principal defendants or of either of them, and that they be discharged with costs, is accordingly affirmed.

A. P. TIER v. JONAS LAMPSON, *appellant*.

[THREE SUITS.]

Principal and Agent.

The implied authority arising from general employment continues even after the agency has in reality ceased, as regards parties who have before given, and continue to give, credit to it, and who have not actually received, and can not be presumed to have had, notice of the change.

THESE actions were all in assumpsit, and were brought respectively upon three promissory notes, which, with the facts in the case, are set forth in the opinion of the court. The causes were referred to a referee, upon whose report the county court, at the March Term, 1861, KELLOGG, J., presiding, rendered judgment *pro forma* in each of the cases for the plaintiff for the amount of each note respectively, to which the defendant excepted.

Washburn & Marsh, for the defendant.

A. L. & H. E. Miner, for the plaintiff.

KELLOGG, J. The notes upon which the plaintiff claims to recover in these three suits were executed to him by one Francis Draper in the name of the defendant, and were respectively signed "Jonas Lampson, by Francis Draper." One of the notes is for sixty-eight dollars, dated September 8th, 1854; another is for fifty dollars, dated April 7th, 1856, and the other is for twenty-seven dollars, dated August 15th, 1857. It appears

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from the referee's report that Draper carried on the business of a blast furnace, or of making pig iron from the ore, and also of a store in connection therewith, at Dorset, from the spring of 1853 to the year 1858, in the name of the defendant. The note dated September 8th, 1854, was given for the plaintiff's interest in a horse which Draper purchased, assuming to act as the agent of the defendant, and it appeared that this horse was used in and about the furnace business for some two or three years after that time, and was finally sold by Draper and the proceeds of the sale were applied by him in the purchase of goods which went into the store. The plaintiff worked in the furnace business carried on by Draper in the defendant's name, from the time that business was commenced "till April, 1854, and for some three or four years thereafter," and the other two notes were given for balances due to him for his labor in and about the furnace business. The question to be decided is, whether the facts found by the referee will justify a recovery by the plaintiff against the defendant upon these notes or upon the consideration on which they were executed.

The contract between the defendant and Draper, dated 28th March, 1853, contemplated that the defendant should purchase the furnace and ore bed at Dorset, and should put the furnace in proper condition for manufacturing pig iron, and keep the same in operation for one year, he providing and furnishing "all necessary and proper tools, utensils, labor, teams, carriages, board, and all other things necessary and proper for carrying on the business of making pig iron from the ore." At this time, the defendant was expecting to remove to Dorset and carry on the business under his own personal supervision, as well as in his own name. The defendant, during the year mentioned in the contract, made advances, as contemplated in the contract, in money and other property, amounting to about eight thousand dollars. About the 1st of May, 1853, Draper was at the defendant's house in Windsor, and it was then agreed between him and the defendant that the defendant should not remove to Dorset, as at first contemplated, but that Draper should repay to the defendant all sums then advanced, or thereafter to be advanced, by him, with interest, and should also pay the defen-

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dant for his trouble in and about the business ; and, at the same interview, Draper told the defendant that he should want to do business in his, the defendant's, name, and the defendant replied that "he could not do anything to make him (the defendant) liable." Soon after the making of the contract of 28th March, 1853, Draper and the plaintiff removed from Windsor to Dorset, and commenced work upon the furnace, and when the plaintiff began his work in and about the furnace, Draper told him that "his work would be for the defendant, and not for him, the said Draper." Up to the time of the making of the agreement between the defendant and Draper on or about the 1st May, 1853, the furnace business was carried on by Draper for the defendant, as well as in his name, and this was contemplated in their contract dated 28th March, 1853. That contract by its express provisions also contemplated that "labor and teams" were proper and "necessary" for carrying on the business, and, during this period, Draper had the management and control of the business which was so carried on, and was acting in the character of a general agent of the plaintiff while so carrying on the business. The plaintiff was employed by Draper, not for himself, but for the defendant ; and, in this state of the facts, it can not be doubted that the defendant was liable, at the time the plaintiff commenced his labor, upon the contract made with him for that labor by Draper, acting in the name and on the behalf of the defendant. The facts reported furnish no ground for any inference that the plaintiff gave credit to Draper, or to any one but the defendant. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent ; 2 Kent's Comm. 614. Under the agreement made on 1st May, 1853, the defendant, as between himself and Draper, was to have no interest in carrying on the furnace business, but was to be repaid by Draper for his advances and compensated for his trouble, and, after this time, the business was in fact so considered and treated as between the defendant and Draper. But Draper continued to carry on the business in the defendant's name as before ; and the defendant knew that Draper was so carrying on the business

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as late as February, 1855, when he, for the first time, told Draper that he must not do business in his name any longer. No notice was given by the defendant to the plaintiff of any change in the relations between himself and Draper at any time, and it does not appear that the plaintiff had any reason to suppose that those relations were different at the time when these notes were executed from what they were when he commenced his labor under his first employment by Draper. The defendant virtually authorized Draper to carry on the business in his name, and this was an apparent authority to him to procure such labor and teams as might be necessary in carrying on the business. The plaintiff would be justified in relying on this apparent authority to Draper until he had reason, either from express or public notice proceeding from the defendant, to believe that Draper was no longer authorized to act as his agent. The plaintiff, having the right, at the commencement of his labor, to look to the defendant for payment, and having no notice of any change in the relations between the defendant and Draper, would be justified in considering the contracts of Draper, while continuing to act professedly as the agent of the defendant, as binding upon the defendant. The implied authority arising from *general* employment continues even after the agency has in reality ceased, as regards parties who have before given, and continue to give credit to it, and who have not actually received, and can not be presumed to have had, notice of the change; Chitty on Contracts, 10th Amer. Ed. 225. We are unable to distinguish between the liability of the defendant for the labor of the plaintiff before the agreement of 1st May, 1853, and his liability for the plaintiff's labor after that agreement; and we consider the defendant liable to the plaintiff on account of the labor and property which formed the consideration of the notes in suit.

The judgment of the county court in each of these three suits, which was *pro forma* in favor of the plaintiff, is accordingly affirmed.

Kelly v. Pember.

DAVID KELLY v. LORENZO D. PEMBER.

Fraudulent Representations. Fraud. Promissory Note. Husband and Wife. Damages.

In an action for the price of land sold, the purchaser may set up in defence the fact that the vendor defrauded him by false representations as to the boundaries of the land.

If the vendor of property takes the purchaser's note for the price payable to the vendor's wife, and no portion of the consideration moves from the wife, the note will be subject to the same defences in respect to the vendor's fraud in the sale, as if the note had been made payable to the vendor himself.

An offer to rescind a fraudulent sale is not necessary to entitle the purchaser to maintain an action to recover damages for the fraud, or to defend an action for the price to the extent of the amount of such damages.

Even when a negotiable promissory note is given for the price of property thus fraudulently sold, and the note remains in the hands of the vendor, the purchaser may, without any offer to rescind, interpose the fact of the fraud in defence to an action on the note, provided the damages occasioned by the fraud are not less than the amount of the note.

Quere, whether he has not the same right of defence to the extent of his damages, when they are less than the amount of the note? PECK, J.

W. and the plaintiff being tenants in common of certain land, the latter requested W. to sell it. W. sold it to the defendant, but the sale was induced by false representations by W. as to the boundaries, of which false representations, however, the plaintiff was ignorant. The defendant supposed W. to be the sole owner, and executed his two promissory notes for part of the price, payable to W.'s wife or bearer, and paid W. the balance of the price in money. The plaintiff afterwards conveyed his interest in the land to W. and received from him one-half of the money and one of the notes received from the defendant. *Held*, in an action upon this note, that the plaintiff was not so far a *bona fide* holder as to prevent the defendant from interposing in defence to the action the damages occasioned him by W.'s false representations, such damages being greater than the amount of the note.

ASSUMPTIT. The facts in the case sufficiently appear in the opinion of the court. The cause was tried by the court at the September Term, 1861, KELLOGG, J., presiding. The county court decided that the plaintiff was entitled to recover the amount of the note in suit, and rendered judgment accordingly, to which the defendant excepted.

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D. E. Nicholson, for the defendant.

B. E. Threlk, for the plaintiff.

PECK, J. The action is upon a promissory note dated June 2nd, 1852, payable to Emily E. Walker, for \$125. The defence relied on is that the note was given as part of the purchase price of a lot of timber land purchased by and conveyed to the defendant at the date of the note, and that a fraud was committed by the seller upon the defendant in the sale, and that the damages resulting from the fraud exceed the amount of the note, and exceed even the whole purchase price of the land. The facts found by the county court fully sustain the defence in point of fact, and the question presented for the decision of this court is whether in point of law such defence is available to the defendant in this action. It is found by the case that the land was conveyed to the defendant by deed describing the land by the number of the lot and name of the original proprietor, and at the time of the purchase George G. Walker, who made the sale, knowingly defrauded the defendant by deceiving him by false representations as to the lines and corners which he showed him as indicating the location and boundaries of the lot; the land shown to the defendant as the lot in question being much more valuable than the lot actually conveyed. It was decided in *Harlow v. Green*, 34 Vt. 379, that an action can be sustained for fraudulent representations by the seller as to the boundaries of land conveyed by deed, whereby the purchaser is deceived to his prejudice. There can be no doubt that the same principle applies where such fraud is set up as a defence to an action for the price. Substantially the same principle applies as is applicable in case of fraud set up in defence of an action for the price of other property sold. It is claimed by the plaintiff's counsel that the facts in this case do not allow the defendant to interpose such defence to the note in suit. It appears that George G. Walker and the plaintiff owned the land in common, each having an equal interest; that the plaintiff requested Walker to sell it, and Walker did sell it to the defendant June 2nd, 1852, executed his deed to the defendant, and received of him therefor \$50 in

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cash and two notes for \$125 each, payable to his wife, Emily E. Walker, or bearer, the defendant not knowing that the plaintiff had any title or interest in the land. After this Walker paid over to the plaintiff one-half of the \$50, and delivered to him one of the notes, the note in suit, and at the same time the plaintiff executed a deed of his undivided half of the land to Walker, of all which the plaintiff notified the defendant before the commencement of this suit. The defendant afterwards paid to Walker the note that Walker retained, and paid the plaintiff \$15 on this note in suit. Up to this time the defendant was ignorant of the fraud in the sale. The fact that the note is payable to Walker's wife is immaterial, as no consideration moved from her. The rights of the parties are the same as if the note had been payable to Walker, who made the sale. Walker in fact, and not the plaintiff, committed the fraud; and Walker became insolvent and left the country before the defendant discovered the fraud. The plaintiff had no knowledge of the fraud till he was informed of it by the defendant after the plaintiff had received the note in suit of Walker, as above stated.

1. Could the defendant avail himself of the fraud as a defence, if the suit were brought by Walker in his own name and for his sole benefit. It is claimed by the plaintiff's counsel that he could not, without first offering to rescind the contract. An offer to rescind the contract is not necessary in order to entitle the purchaser to maintain an action for damages for the fraud. It is necessary where he seeks to recover back the consideration paid; then he must offer to return what he has received, and rescind the contract. The same rule applies if the party seeks by way of defence to avoid the whole contract on the ground of fraud where his damages occasioned by the fraud are less than the plaintiff would otherwise be entitled to recover. But no offer to rescind is necessary to entitle the party defrauded to maintain an action for damages for the fraud, nor to entitle him to defend to the extent that he has suffered by the fraud, that is, to the extent that he would be entitled to recover in an action for damages founded on the fraud. The question may as well be tried in an action for the price, and the rights of the parties be settled in one suit, as to allow the plaintiff to recover the whole

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stipulated price, and then permit the other party to recover back the whole or a part in an action for the fraud. It is the policy of the law to avoid a multiplicity of suits.

But it is claimed that, as the defendant has given a negotiable promissory note, a different rule applies, and that the defendant is bound to pay the note and seek his remedy by action for damages, and that a partial failure of consideration, or partial damages of this character, is no defence to a promissory note where there has been no offer to rescind the contract. There are some authorities to the effect that where the failure of consideration or damages sought to be deducted are partial, and of an uncertain character and to be assessed by the jury, and not mere matter of computation, such partial defence can not be received in an action on a promissory note; and perhaps the cases in this state countenance or sustain that proposition. But I never could see why such defence ought not to be allowed in actions on notes and bills of exchange as well as in other actions, except where the suit on such paper is by an innocent holder for value. If there is such a rule there ought not to be; it is sustained by no principle of policy, convenience or justice. While a promissory note remains in the hands of the original contracting parties there is no sound reason why it should receive any more protection or immunity in this respect than any other contract. But it is unnecessary to decide this question, because in this case the facts do not bring the case within that rule, if the law is as the plaintiff claims. *First*, the damages in this case are not partial, but entire, going not only to the full amount of the note, but to the full amount of the contract price of the land. *Secondly*, the facts found by the county court show that the defendant did offer to rescind the contract before the suit was commenced.

2. It is also claimed by the plaintiff's counsel that as against this plaintiff the defence can not prevail, because the plaintiff was not a party to the fraud, had no knowledge of it, and therefore is not affected by it. But the answer to this objection is, that he was substantially a party to the contract, had a joint interest with Walker in it, and is seeking to enforce it and take the benefit of it. Walker must be regarded as his agent both by reason of their joint ownership of the land, and by his having

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requested Walker to sell it. Whether an action for the fraud could be maintained against the plaintiff it is not necessary to decide, but it is well settled that in such case where the plaintiff seeks to enforce the contract, he takes it *cum onere*, and is affected by the fraud as a defence to the same extent as if he had been actually privy to it in its inception.

It is further claimed that the plaintiff is to be regarded as a *bona fide* holder of the note for a valuable consideration without notice. If so, the county court was right in holding that the defence relied on by the plaintiff could not prevail. The plaintiff took the note without notice and while current, but he did not take it for value in the sense of the commercial rule. The deed which the plaintiff executed to Walker of his undivided half of the land that Walker had at his request sold to the defendant, was only a mode of carrying out the contract with the defendant and investing the defendant with the title, which it was the plaintiff's duty to do, either by executing a deed to the defendant or a deed to Walker, which would enure to the defendant's benefit. The taking of one-half the \$50 and this note of Walker was only an equal division of the avails of the sale, according to their respective interests, and in no sense was it a purchase of the note for value. We should regret very much if the law compelled us to decide that upon the facts in this case the plaintiff was entitled to recover this note, but we feel under no such embarrassment, for the result to which we have arrived not only accords with our sense of the justice of the case, but in our opinion it is in harmony with well settled principles of law.

The judgment of the county court is reversed, and as the trial was by the court, and the facts fully stated in the exceptions, such judgment is here to be rendered as the county court ought to have rendered.

Judgment reversed and judgment for the defendant.

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DANIEL PACKER v. HIRAM F. BUTTON.

Sale. Contract. Damages. Earnest Money. Demand.

In an executory contract for the sale of property to be received and paid for at a specified time, the purchaser, in order to recover damages for non-performance of the contract by the seller, must offer to receive the property and pay the price, *at the stipulated time*, unless the seller has put it out of his own power to perform the contract, and this fact is known to the purchaser, and he for that reason omits to make such offer.

But the purchaser may, in such case, recover back the earnest money paid by him, if the seller before the time of performance has repudiated the contract and contracted to dispose of the property to another person, even though this fact be not known to the purchaser, who is only prevented from making a seasonable offer to perform on his part by an unforeseen accident which delays his arrival at the place of delivery until after the appointed time.

Held, in such a case, that the purchaser could recover back the earnest money paid by him, without any demand upon the seller before suit.

ASSUMPSIT, on a contract for the purchase of a quantity of wool, sold by the defendant to the plaintiff. The declaration also contained the common money counts. Plea, the general issue, and trial by jury at the September Term, 1861, KELLOGG, J., presiding.

The only question, on which exceptions were taken, related to the right of the plaintiff to recover thirty dollars, paid by the plaintiff to the defendant, as earnest money on said contract. On this question, the plaintiff's evidence tended to prove, that, about the 25th of November, 1858, he contracted with the defendant for the purchase of his wool, amounting to about 2800 pounds, at the price of forty-three cents per pound; and was to take the delivery of the wool, and pay for it, by the 15th of December, then next, at the defendant's dwelling house in Clarendon; that, at the time of making this contract, he paid to the defendant the sum of thirty dollars, by way of earnest money or part payment on account of the contract; that, on the 11th of December, 1858, it was mutually agreed between the plaintiff and the defendant that the time for the performance of the contract should be extended so that the plaintiff should take the delivery of the wool, and pay for it, by the 1st of February then

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next ; that on the 1st of February, the defendant sold the wool to one Langdon, for the price of fifty cents per pound ; and delivered it on such sale to Langdon on the next day following, being the 2nd of February, 1859 ; that about nine o'clock in the morning, on the 2nd of February, 1859, the plaintiff went to the dwelling house of the defendant, and found Langdon there, engaged in sacking the wool ; and that the plaintiff then and there offered to the defendant to take the wool, and to pay for it the price stipulated in the contract between them ; and that the defendant then and there refused to deliver the same to the plaintiff, on the ground, as he then claimed, that the plaintiff had neglected to come for the wool and pay for it in the preceding month of January ; which last named month, the defendant then claimed to be the time limited by the terms of his contract with the plaintiff, as extended and enlarged, for its performance by the plaintiff.

The terms of the original contract of sale between the plaintiff and the defendant, and also the payment by the plaintiff of thirty dollars to the defendant, on account of the contract, were admitted by the defendant, as claimed by the plaintiff.

The defendant's evidence tended to prove that the time agreed upon for the performance of the contract was extended so as to include the month of January only ; that he made a parol contract merely with Langdon for the sale of the wool, on the 1st of February, and received no payment therefor, and delivered none of the wool under such sale, until after the 1st of February ; and that he had the wool in his possession up to and through the 1st of February, so that he could on that day, or at any time before, have delivered the same to the plaintiff in performance of his contract with the plaintiff, as the plaintiff claimed it to be, if the plaintiff had called upon him for that purpose.

It was admitted that the plaintiff never made any special demand upon the defendant for the repayment of the earnest money ; and never made any demand, whatever, for such repayment, before or otherwise, than by the commencement of this suit.

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It appeared that the plaintiff resided in Mount Holly, and the plaintiff's evidence tended to prove (and on this point it was not contradicted,) that owing to a snow storm of unusual length and severity, the roads in the vicinity were, on the 1st day of February, 1859, and for two or three days before that time, very much blocked up and obstructed by snow-drifts, so as to render travelling on the same very difficult, if not impracticable.

The defendant claimed that the plaintiff was not entitled to recover the earnest money, if the jury should believe his evidence relative to his contract with Langdon ; although they might find that the time for the plaintiff's performance of his contract was, by agreement of the parties, extended to, and included, the 1st day of February ;—and requested the court so to instruct the jury. But the court declined so to instruct the jury ; and after instructing them, as to the rights of the parties to a performance of their contract on the 1st day of February, in a manner not excepted to, charged them, that if, under such instructions, and on the evidence in the case, they should find that the time for the performance by the plaintiff, of his contract with the defendant, as agreed upon by the parties, was extended to, and included, the 1st day of February, and that before the expiration of the 1st day of February, the defendant sold the wool to Langdon, such sale would be equivalent to an abnegation and abandonment on the part of the defendant of his contract with the plaintiff, and that it thereupon became his duty to pay back the earnest money to the plaintiff, and that this duty would not, in such case, depend upon any demand on him by the plaintiff, for the same ; and that the plaintiff would in that case become entitled to treat the contract as rescinded, and to recover back the earnest money, with interest thereon from that time up to the time of trial, notwithstanding they might also find the evidence thus given by the defendant, in respect to his contract with Langdon, and his possession of the wool after that contract was made, all to be true, and notwithstanding that no special demand for the repayment of the earnest money was made on the defendant at any time prior to the commencement of this suit.

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The defendant excepted to the charge, and the refusal of the court to charge in the particulars above mentioned.

The jury returned a verdict in favor of the plaintiff, for the sum of \$34.74 damages, being the amount of the earnest money, with interest thereon from the 1st of February, 1859, up to the time of trial.

E. Edgerton and *E. J. Phelps*, for the defendant.

D. E. Nicholson and *Daniel Roberts*, for the plaintiff.

POLAND, CH. J. The plaintiff in November, 1858, contracted with the defendant for the purchase of his wool, and at the time of making the contract paid thirty dollars to the defendant, as earnest. By the original contract the plaintiff was to take the wool at the defendant's house and pay the balance of the price by the 15th of the succeeding December. The jury have found that by a subsequent agreement, the time for taking the wool and paying the balance of the purchase money was extended to the 1st day of the following February. The defendant claimed that the extended time expired on the last day of January, and on the 1st day of February he sold the wool to one Langdon, but did not deliver the same, or receive any part of the price on that day, nor was there any memorandum in writing made of the contract. The plaintiff was prevented from reaching the defendant's house on the 1st of February, by reason of the roads being obstructed by a heavy fall of snow, but did appear there on the morning of the next day and offered to receive and pay for the wool, but the defendant refused to deliver him the wool, claiming that the contract expired on the last day of January, and the defendant was then engaged in delivering the wool to Langdon. The single question now presented by the case is, whether the plaintiff can recover back the deposit of thirty dollars, paid to the defendant when the contract was made.

The county court held, that as the plaintiff did not appear, and offer to receive and pay for the wool within the time limited by the contract, he was not entitled to recover damages for the defendant's refusal to deliver the wool, though but a few hours

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had elapsed, and the plaintiff was prevented by inevitable accident from complying with its terms, and that the plaintiff could not recover such damages either by reason of the defendant's sale to Langdon, because such sale was not so perfected by a delivery as to actually put it out of the power of the defendant to perform his contract with the plaintiff if the plaintiff had himself offered to perform in time. The correctness of this ruling is not now before us for revision, but we have no doubt of its entire soundness.

As we understand the law, in a contract of this sort, the purchaser, in order to entitle himself to a performance by the seller, must offer to receive the purchased property and pay the price, and nothing will excuse him from so doing, except that the seller has put it out of his power to perform. If the seller has put it out of his power to perform, and this be known to the purchaser, and for that cause he omits to make what he knows must be a wholly useless offer to perform, he may hold the seller liable. But, if the seller has put it out of his power to perform, but this is unknown to the purchaser, and he does not act upon it, or for that cause omit to offer to perform, but omits it because he himself does not wish to perform it, it seems to us very doubtful indeed if he could hold the seller to the contract. It would appear very much like an abandonment of the contract on his part.

The defendant claims that the right to recover back the money advanced stands upon the same principle, as the right to recover damages for the breach of the contract, unless the contract has been rescinded by the agreement of the parties; that any failure by the plaintiff to perform, which would preclude him from recovering damages, would equally preclude him from recovering back what he has paid to the defendant, and that no fault of the defendant would make him liable to pay back what he has received, unless it be such as would also subject him to damages for not performing the contract.

The law is well settled as we believe, that in a contract of purchase where the purchaser pays a part of the price in advance, but fails to pay the residue according to the contract, so as to entitle him to performance, and the seller is in no fault, what has thus been paid can not be recovered back. The law will not

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allow the party who is solely in fault for not having the full benefit of his contract, to abandon it, and recover back what he has paid or done under it.

The only case cited that is claimed to be at all opposed to this view is *Raymond v. Bernard*, 12 John. 274. It would seem, as the facts are stated in that case, that the plaintiff was the party in fault in not offering to perform, or calling for a performance by the defendant, until long after the contract expired. But the case is put upon the ground, that the contract was put an end to by the defendant, and that therefore they were liable to repay the money the plaintiff had paid under the contract. It appears also in that case, that the defendant did not claim, when the plaintiff called for performance of the contract, that he was entitled to retain the money advanced, but tendered it to the plaintiff. The case of *Ketchum v. Everton*, 13 Johns. 359, recognizes the principle as above stated, and the reasons for it are very clearly and forcibly stated by SPENCER, J., who pronounced the judgment of the court. In *Cobb v. Hall*, 29 Vt. 510, this principle was applied to a parol purchase of land, and the purchaser was not allowed to recover back what he had paid, upon his own refusal to complete the contract, though the contract could not be enforced by either party, not being in writing. If this contract, therefore, came to an end wholly by the fault of the plaintiff, it is clear that he is no more entitled to recover back what he has paid under it, than he is to damages for the defendant's non-performance of it. But we think that the plaintiff may be entitled to recover back what he has paid, though not entitled to recover damages for a breach of the contract, even though the contract has not been rescinded by any agreement of the parties.

In Chitty on Contracts 276, it is stated, "It seems if neither party be ready by the appointed time, and both are in default, the contract is at law *ipso facto* dissolved, and the deposit is recoverable, unless the time has been prolonged by consent." And the same doctrine is stated by the same author in a note under page 386.

In the case of *Ketchum v. Everton*, before cited, SPENCER, J., says, that the party paying money under a contract can not

recover it back, "the other party being ready and willing to proceed and fulfill all his stipulations according to the contract."

Almost the same language is used by Judge REDFIELD, in the case of *Cobb v. Hall*, *ub. sup.*, and is the common language of that class of cases.

This leads us to look at the relative position of the two parties to this contract, to see which was most in fault for the non-fulfillment of it.

The plaintiff was diligently and anxiously endeavoring to perform it on his part, to secure the advantage of a beneficial contract, and was a few hours behind time, and that by reason of an unforeseen and unavoidable accident.

The defendant, at least one day before the contract expired, entirely repudiated it, and denied that the plaintiff had any right to have it performed, and made another contract to sell the wool, at a much higher rate than he was to receive from the plaintiff. The contract that he made was one that he could not by law be compelled to perform, but it was not a void contract, and there is nothing to show that he did not intend to perform it, and on the next day it was perfected by a delivery.

It is entirely evident from the case that if the plaintiff had called for the wool on the 1st day of February, and offered the contract price, he would not have obtained it, as the defendant denied any liability on his part to perform it.

Under these circumstances it seems absurd to allow the defendant to say, "I held myself ready and willing to perform the contract on my part, until you failed to perform on yours, and I therefore claim to retain what I have received, as a forfeiture for your non-fulfillment."

Neither party was ready to fulfill the contract at the time stipulated, but the plaintiff's unreadiness was the result of accident, while that of the defendant was his own unwillingness to perform, and desire to make a better contract than he had made. The plaintiff's failure, though not through any actual fault, has the legal effect to deprive him of his right to enforce the contract, but the defendant is not in a condition to say, that he is without fault, and will exact the forfeiture of what the plaintiff has paid.

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The defendant claims, also, that the plaintiff can not recover back the money paid, for want of a demand of it before suit.

The defendant received the money rightfully, but when the contract under which he held it was brought to an end, so much by his own fault that he was not entitled to retain it, it became his duty to repay it without any special demand upon him. The fact that the plaintiff claimed that the contract was wholly broken by the defendant, so that he was entitled to recover damages for the breach, is no reason for denying him such lesser remedy as he is found entitled to upon trial, his action being appropriately framed for that purpose.

The judgment is affirmed.

EDWARD N. LAPHAM v. STEPHEN KELLY.*Evidence. Payment.*

A pass book, upon which a party entered at the time memoranda of certain payments made by him upon a note which he owed, is not admissible as *independent* evidence by itself to prove such payments. But it may be referred to by such party, when a witness, for the purpose of refreshing his recollection of the fact, and it may go to the jury when used for that purpose, and also as confirmatory of the testimony of the party.

If the witness testifies that the facts were within his recollection when he made the memorandum, and that he is confident that he made it correctly at or about the time of the transaction, the memorandum may go to the jury, in connection with his testimony, as evidence of the details of the matter, even though at the time of testifying he has only a general recollection of it.

If one, owing two debts, overpay one of them, and there is any testimony tending to show that the parties mutually expected such overpayment to apply upon the other debt, it is error for the court, in an action upon the latter debt, (no plea of set off being filed,) to instruct the jury that such overpayment can not be regarded as a payment upon the debt in suit, but can only be treated as the basis of an independent action to recover it back, or of a plea of set off.

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ASSUMPSIT upon a promissory note, signed by the defendant, and payable to John V. Lapham, or bearer. The declaration also contained the common money counts. Plea, the general issue, with notice under the statute (Acts of 1856, No. 8,) that the defendant would rely upon and show payment in defence. Trial by jury at the March Term, 1861, **KELLOGG, J.**, presiding.

It appeared that on the date of the note in suit, the defendant executed to John V. Lapham, two other promissory notes, which, with the note in suit, were transferred by the payee to the plaintiff, soon after their execution. It was admitted that after these notes were transferred to the plaintiff, there was an understanding had between him and the defendant, that he should receive payments amounting to the sum of one hundred dollars or more, to apply on either of the three notes, at any time when the defendant might desire to make such a payment.

The defendant testified that the two notes which first became due, were paid and taken up on the 11th November, 1853, or a few days thereafter, and that there was an over-payment of "about twenty-three dollars" on them at the time they were taken up, and that there had been a controversy between the plaintiff and himself, whether the sum so over-paid was reckoned in and applied, as a part of one of the subsequent payments indorsed on the note in suit—the plaintiff claiming that it was so included and applied, and the defendant claiming that it was not. The plaintiff testified that at the time the two notes were paid and taken up, which, as he thought, was "about the 20th December, 1855," there was a balance of over-payment made by the defendant on the same, "of somewhere about twenty dollars," which was to be accounted for to him, and that he, the plaintiff, kept the money, and that this over-payment was included and accounted for to the defendant, in the first indorsement made on the note in suit. This was all the testimony in the case, in relation to this over-payment.

The defendant testified that he personally paid to the plaintiff, the sum of \$150, on the 20th November, 1853, at the tavern at Danby Borough, and the further sum of \$200, on the 15th December, 1853, at the Union Store, in the same village; and

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that both payments were made to be applied on the note in suit. The plaintiff denied both of such alleged payments; and these were the only payments which the defendant claimed to have made on the note in suit, exclusive of the endorsements. The defendant claimed that, in addition to the payments indorsed on the note in suit, the amount of the said over-payment made on the two other notes, together with these two alleged payments, which were denied by the plaintiff, should be allowed and applied on the note in suit; and, the principal question on the trial was, whether these two payments, so contested, and in dispute between the parties, as aforesaid, were made as claimed by the defendant.

The defendant introduced evidence tending to show that all of the payments made by him on the three notes, were made by himself personally, and that, at the time when he made the payments on the note in suit, the note was not there, and that he never took any receipt for any payment made by him personally on said note, and that the indorsements made on the note, were not, in any instance, made in his presence. The plaintiff testified that no payment was ever made to him on the note in suit, unless the same was indorsed on the note, and that the first that he ever heard, in respect to these two disputed payments, was from the defendant, while testifying as a witness on the trial.

The defendant also testified that when the payments on each of the three notes were made, he kept a pass-book, which was the book, and the only book, on which his cash transactions were entered during that period; and that each of the entries on this book was made at the time when the transaction of which it purported to be an entry, took place; and that the plaintiff saw this pass-book, and examined it, when the two notes which first became due, were finally paid and taken up. The defendant then produced this pass-book, and offered the same as independent evidence, tending to show the payment by him to the plaintiff, of the sums, which the defendant claimed to have paid on the note in suit; and the same being objected to by the plaintiff, it was excluded by the court. To this decision of the court the defendant excepted. But the court admitted the pass-book, as a memorandum made and kept by the defendant, to which he

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he might refer, for the purpose of refreshing his memory in respect to the matter of any entry therein contained, and the pass-book was treated as being in the case for this purpose.

The court ruled, and so instructed the jury, that if the jury should find, as the defendant's testimony tended to show, that the amount of the over-payment on the two notes which first became due, was at the time of trial in the hands of the plaintiff, as money to be accounted for by him to the defendant, still, as the same testimony would, if believed, support a separate action, or a plea of set-off, in favor of the defendant against the plaintiff for the amount of this over-payment, the defendant could not avail himself of the benefit of the over-payment on the other two notes, in support of his defence of payment of the note in suit. The defendant filed no plea in offset in this suit. To this decision and instruction the defendant also excepted.

Linsley & Prout and M. H. Cook, for the defendant.

D. E. Nicholson and E. J. Phelps, for the plaintiff.

PECK, J. This was an action on a promissory note for \$1000, dated April 5th, 1853. The only question litigated before the jury was as to the amount of payments made by the defendant on the note. It appears that some payments were endorsed upon the note, about which there was no dispute. But the defendant claimed and testified that he personally paid to the plaintiff \$150, on the 20th November, 1853, at the tavern at Danby Borough, and the further sum of \$200, on the 15th December, 1853, at the Union Store in the same village, both to apply on the note in suit. The plaintiff denied these payments, and testified in substance that no such payments were made. It appears that two other notes for \$1000 each were given at the same time the note in suit was executed, which had been paid from time to time and taken up. All these notes were executed by the defendant to John V. Lapham, and before payment were transferred to the plaintiff, to whom all the payments were made. The defendant testified that when the payments on each of the notes were made, he kept a pass-book, which was the book, and

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the only book, on which his cash transactions were entered during that period, and that each of the entries on the book was made at the time when the transactions respectively took place. The defendant produced the book on the trial in the county court, and produces it here, it being referred to in the exceptions. The book contains entries, in the form of charges to the plaintiff, of the two payments in dispute, corresponding in sums and dates with the defendant's testimony on this point.

This book was offered in evidence by the defendant as *independent* evidence to show these payments, and on objection by the plaintiff it was excluded by the court as independent evidence, to which decision the defendant excepted. The court, however, admitted the book as a memorandum made and kept by the defendant, to which he might refer for the purpose of refreshing his memory, and it was treated, as the exceptions state, as being in the case for that purpose. From this we understand the book was treated as evidence, and went to the jury with the other evidence in the case. This seems to be conceded by the defendant's counsel; at least as far as this, that it went to the jury. But the court decided in thus admitting the book that it was not independent evidence. This decision we think was correct. On inspection of the book, considering the character and purpose of the entries and the defendant's testimony, the book, in the opinion of the court, is not such a book kept in the regular course of business, as to be admissible as evidence *per se*, independent of the testimony of the party tending to prove the correctness of the entries of the transaction in dispute; especially as the entries are not entries of a transaction creating an indebtedness, like the sale of goods, the performance of services, regularly charged on the book of accounts of the party, but a memorandum of a payment made upon a note in discharge of a debt. The entries must be regarded as in the character of a private memorandum, made to preserve the facts in the recollection of the witness. In such cases the entry or memorandum is not independent evidence; it can in general only be used to refresh the recollection of the witness, or as confirmatory of his testimony. The light in which such memoranda are to be regarded, the purpose for which they are to be used, under what circumstances and to what extent

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they may be treated as evidence, is a question which has been much discussed in the books, and in relation to which the authorities are far from being uniform. We think it may safely be said that the authorities establish the proposition recognized in the decision of the county court, that they have not the force of independent evidence, but are dependent on the testimony of the witness that the facts were within his knowledge and recollection when he made the entries, or memoranda, and that they were correctly made. ✓ The county court was also right in saying the book was evidence to refresh the recollection of the witness, and in allowing it to go to the jury. Formerly the rule in England seems to have been that such a memorandum could only be used by the witness, and if on reference to it for the purpose of refreshing his memory he could not recollect the facts contained in it, his testimony was excluded, and whether he had a present recollection of the facts or not, the memorandum could not be used or allowed to go to the jury. But a more liberal rule seems now to prevail there. It is now there left to the witness to say whether he has such confidence in the accuracy of the memorandum that he is willing to testify to the fact; if so, his evidence is received, although he at the same time says that he has not a present recollection of the facts. The rule that has latterly prevailed in this country is equally liberal, and in one respect more so, as the memorandum or entry is often allowed to go to the jury with the testimony of the witness. If the witness testifies that the facts were within his knowledge and recollection at the time he made the entry, and is confident that he made it correctly about the time of the transaction, and still recollects the transaction generally, although not all the details of the entry, his evidence is received in connection with the memorandum, and both go to the jury, and the memorandum is regarded as auxiliary to, or confirmatory of the witness, and may also be used as evidence of the details to supply the present want of recollection, particularly as to names and dates. There are cases which go further, and hold that it may be used in connection with such evidence as to its having been correctly made at the time of the transaction, although the witness can not recall to his recollection any of the facts indicated by it. Such entries

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are auxiliary evidence, also, when the witness still professes to recollect the facts, as many of the cases hold. This is reasonable, as, on inspection of the entry by the jury, it may contain internal evidence as to the time when it was made, and if made at the date of the transaction, it tends to confirm the witness, as he would be less likely to have forgotten the transaction when he made the entry than when called on to testify, after a lapse of time, without any cotemporaneous entry or memorandum to refresh his recollection. Hence it is proper that the entry should be submitted to the jury. Some cases are cited from New York by the defendant's counsel to show that such entries are admissible as independent evidence, but they do not sustain the proposition. Indeed, in one respect those decisions do not go so far as we have already stated the modern rule to be. There they only allow the entry or memorandum to go to the jury, when the witness has not a present recollection of the facts. In such case they admit the entry or memorandum as secondary evidence on the same ground that parol evidence is admitted to prove the contents of a lost written instrument; treating the lost recollection of the witness as they do a lost note or other instrument. In *Russell v. The Hudson R. R. Co.*, 17 N. Y. 184, not cited by counsel, the memorandum was read to the jury in connection with the testimony of the witness, and the judgment was reversed because it did not appear but that the witness recollected and testified to all the facts contained in his memorandum. This case is cited and approved by the court in *Gay v. Wead*, 22 N. Y. 362, cited by the defendant's counsel. If we follow that case the error of the county court was in letting the book go to the jury at all. But we do not think the rule should be thus limited. The book was not independent evidence, and the county court were not in error in so ruling on the admission of it. It was not error in the county court in holding that it might be referred to for the purpose of refreshing the recollection of this witness. It can not be complained of as error that the court excluded the book from the jury, for it was admitted and allowed to go to the jury. But we think it was admissible also for another purpose, that is, as confirmatory of the evidence of the defendant in connection with his testimony. But there is no error of which the

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defendant has the right now to complain. If the defendant's counsel wished to use it for that purpose, he should have called the attention of the court to it in the course of the trial, or asked some instructions to the jury in relation to it. In the absence of anything of this kind, and in the absence of anything to show what instructions were given to the jury on the subject, we can not say there was error. The fact that the court did not assign all the reasons which they might have assigned for admitting the evidence, or name all the purposes for which it might be used, is not error, as it does not appear that the defendant was deprived by any ruling of the court of any legitimate use of the evidence which he claimed.

2. There is an exception taken by the defendant to the ruling of the court in relation to the \$23.00 which he claimed to have allowed as a payment. The court charged the jury as to this item, that if the facts were as the defendant's evidence tended to prove, he could not avail himself of it as a payment, as it would entitle him to maintain an action upon it. If the evidence had any tendency to show any agreement or understanding between the parties, either at the time of, or subsequent to, the receipt of the \$23.00, that it should apply upon the note in suit, this instruction was erroneous. In our opinion it had such tendency. The three notes given at the same time constitute substantially one debt. It was agreed between the parties that the defendant might at any time pay any sum not less than \$100, to apply on either of the notes. He paid from time to time until about the 11th November, 1853, as the evidence tended to show, when he made a payment and took up the other two notes. At this time there was an over payment of \$23.00. There was a dispute between the parties whether this sum had been subsequently applied on this note and included in one of the endorsements. It is termed an overpayment, but it is not shown to have been an overpayment by mistake. If it was simply a payment of so much more than the amount due on the other two notes, it is open to the inference that the surplus was mutually expected to be applied on this note. This is rendered the more probable from the fact that the plaintiff claimed before the trial and on trial that he had so applied it. The judgment must therefore be

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reversed. If the plaintiff, however, elects to remit the \$23.00 and interest, taking the amount and time of payment as the defendant's evidence tends to prove it, he may have judgment accordingly, but still the defendant must recover costs in this court, as he succeeds in reversing the judgment.

The judgment of the county court is reversed, and as the plaintiff elects to remit the \$23.00, judgment is rendered for the plaintiff with that deduction.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,	} ASSISTANT JUDGES.
HON. JOHN PIERPOINT,	
HON. ASAHEL PECK,	

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JAMES M. SHAW v. THOMAS S. BEEBE AND JOHN W. SIMONDS.

Estoppel in Pais. Notice.

An estoppel *in pais* exists when a party makes a statement to another for the purpose of inducing a certain course of action, which statement that other relies and acts upon in the manner expected, and which it would be a fraud in the party making the statement to afterwards controvert, so far as the statement affects the other's pecuniary rights.

The rule of estoppels *in pais* is equally applicable to affect the title of land as of personal property.

W. and S., by permission of a railroad company, erected a store on the land of the company, and were to own it in common. While the record title still remained in the company, S. advised W. to sell his share to L., and informed L. that if he bought it, he would be entitled to one-half of the rents. L., in reliance upon these statements of S., took a conveyance of one-half the store from W. and allowed W. \$500 for it towards the latter's indebtedness to him. S. witnessed the deed from W. to L., and was aware of its contents. Afterwards S. took a lease to himself of the whole store from the railroad company. *Held*, that he was estopped from claiming, in an action of ejectment, more than half of the store as against L. or his grantees.

After the conveyance from W. to L., the latter conveyed his share in the store to another party, who entered into possession, claiming to own one-half of the property. While so in possession, S. conveyed the whole store to the plaintiff, who purchased in reliance upon the fact that the record title was solely in S., but with knowledge that L.'s grantee was in possession, and of his claim of title to one-half of the property. *Held*, that the possession of L.'s grantee with such a claim of title, was sufficient notice to the plaintiff of his claim, to put the plaintiff on inquiry, and, therefore, having purchased without making proper inquiry, he was, equally with S., estopped from claiming more than half of the store.

EJECTMENT for a store, and the land upon which it stood, in Rupert. The case was referred, and the referee reported the following facts: David Sheldon, who owned the land in question previous to May 1st, 1852, on that day conveyed it, with other land surrounding it, to the Rutland and Washington Railroad Company. About the time of this conveyance to the railroad company, that corporation gave permission to Henry Shaw and Washington Kinne to erect a store on the land in question. The parties to whom this permission was given, agreed between themselves that Henry Shaw should erect the

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store, using certain materials which Washington Kinne had procured, for which Shaw was to pay Kinne, and that Kinne should allow to Shaw four hundred dollars, as one-half of the cost of the store, and that when this sum was paid to Shaw, he was to convey an undivided half of the store to Kinne. Shaw proceeded with the erection of the store, and finished it in the course of that season, and Kinne furnished materials to an amount of something less than four hundred dollars, which amount so furnished he charged to Henry Shaw. Washington Kinne never paid Henry Shaw for building half of the store, except as above stated; and though their accounts were settled in 1854, Kinne was indebted to Shaw, so that the price for building half of the store still remained unpaid. Washington Kinne, however, always expected to have half of the store in the end, and Henry Shaw expected he would have it.

After the completion of the store it was occupied by Washington Kinne until June 6th, 1854, during which time he paid Henry Shaw rent for one-half of the store, at the rate of forty dollars a year, and Henry Shaw and Washington Kinne had the store insured to them jointly, and they each paid half the taxes on it. In the spring of 1854, Henry Shaw stated to the defendant Beebe that Washington Kinne owned half of the store.

On the 6th of June, 1854, Washington Kinne, being in failing circumstances, upon the advice of Henry Shaw, executed a deed of half the store to his father, Lyman Kinne. This deed was witnessed by Henry Shaw, who then knew substantially its contents, but Lyman Kinne was not present at the execution of that deed—had not asked for it—knew nothing about it, and paid nothing for it; though he was liable as surety for Washington Kinne to a large amount, far exceeding the value of one-half of the store. The deed was, about four days after its date, delivered by Washington to Lyman Kinne, and Henry Shaw, who was then present, told Lyman Kinne that half the rents would go to him and the other half to himself, and Lyman Kinne subsequently agreed to allow Washington Kinne five hundred dollars for the store.

Henry Shaw occupied the store after the deed to Lyman

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Kinne, about two weeks ; and then sold the goods to Harvey Sheldon.

Harvey Sheldon occupied the store about four months, during which time, Henry Shaw told the defendant Beebe that Lyman Kinne owned one-half of the store and he, Shaw, the other half.

Sheldon, about November 11th, 1854, sold the goods to the defendant Beebe, who occupied the store from that time for about two years and a half.

On January 16th, 1855, Lyman Kinne executed a deed of one-half of the store to Marvin & Van Alstyne.

While Beebe occupied the store he paid rent for one-half of the store to Lyman Kinne, and to Marvin & Van Alstyne, after the conveyance from Kinne to them, and was always ready to account to Henry Shaw for the other half of the rent. During Beebe's occupancy Henry Shaw proposed to him at one time that if he would buy Kinne's half of the store, and at another if he would buy Marvin & Van Alstyne's half, he would pay Beebe three hundred dollars for it.

On the 18th of August, 1855, Henry Shaw took a lease from the Rutland and Washington Railroad Company of the whole store, and the land on which it stood, for such period as it should be occupied as a store. Shortly after taking this lease Henry Shaw informed Beebe of the fact, and that he should claim the whole store and the whole rent of it, in virtue of the lease, admitting, however, that Washington Kinne had paid him for half of the store; but claiming that Washington Kinne owed him, and saying that he calculated to get his pay then.

On the 21st of January, 1857, Henry Shaw executed to the plaintiff a quit-claim deed of the whole premises in question.

In March, 1857, Marvin & Van Alstyne executed to the defendant Beebe a deed of half of the store, shortly after which Beebe sold the goods to the defendant Simonds, and rented to him an undivided half of the store, and Simonds remained in possession up to the time of trial, having paid Beebe rent for one-half of the store.

On the 1st of November, 1858, and before the commencement of this suit, the plaintiff demanded of both the defendants

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possession of the store, which they refused to deliver up to him.

Upon these facts the county court, at the June Term, 1861, KELLOGG, J., presiding, rendered judgment, *pro forma*, for the defendants, to which the plaintiff excepted.

Fayette Potter, for the plaintiff.

H. Canfield and E. B. Burton, for the defendants.

ALDIS, J. It is to be observed in this case that at the time Washington Kinne deeded one-half of the premises in question to Lyman Kinne, the record title was in the railroad company. Washington Kinne was in possession of the land, claiming to own one-half, and that Henry Shaw owned the other half; but as neither of them had received any deed or lease from the railroad company, there was no way by which a purchaser could ascertain the respective interests of Washington Kinne and Henry Shaw in the land, except by inquiry of them. Hence Lyman Kinne, when he took the deed from Washington Kinne, was obliged to rely upon the statements of Washington Kinne and Henry Shaw as to their respective interests in the land.

Washington Kinne deeded him half of the store and land. Shaw was present when the deed was made, advised Washington Kinne to make it, witnessed it, was present when it was delivered to Lyman Kinne, and told him that half the rents would go to him, and the other half to himself.

The defendants claim under a title derived from Lyman Kinne, and insist that these acts and declarations of Henry Shaw estop him and his grantee, the plaintiff, from claiming title to the land.

1. Is Henry Shaw estopped? An estoppel *in pais* exists when a party makes a statement to another, which that other relies and acts upon, and which it would be a fraud in the party making the statement to afterwards controvert, so far as the statement affects the other's pecuniary rights.

In the case at bar, if Lyman Kinne, relying on such statements of Shaw, that Washington Kinne owned half the land, had

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then and there paid Washington Kinne the value of the land, \$500, no one can doubt that it would have been a fraud for Shaw to claim to own the whole of the land himself.

The case finds that Lyman Kinne afterwards agreed to allow Washington Kinne \$500 for the lot; and that he was at the time liable for him as surety to a much larger amount than \$500. The time he so agreed is not distinctly stated, nor is it expressed in the exceptions that he did so relying upon Shaw's statement; but we think a reasonable construction of the bill requires us to find that he did so agree with his son, relying on the declarations of Shaw. We find these declarations of Shaw are stated to have been continued, and Washington Kinne's title to half the store expressly recognized and declared by him to exist up to September or October, 1855, and the sale to Lyman Kinne by his son was June 6th, 1854, fifteen months previous. And during this fifteen months the land had been sold by Lyman Kinne to Marvin & Van Alstyne, and the defendant Beebe had taken possession of the store, holding one-half under Lyman Kinne's title and as tenants of Marvin & Van Alstyne, to whom Lyman Kinne had deeded the one-half, with covenants of warranty. It would seem a forced construction of the exceptions to say that Lyman Kinne in allowing his son \$500 for the land did not rely on Shaw's statements. He could not ascertain the interest of his son and of Shaw except by their statements.

It is to be noted, too, that when Shaw witnessed the deed to Lyman Kinne, he fully understood its contents.

Under these circumstances we think it would be fraudulent in Henry Shaw to set up a claim to that half of the land which he had thus induced Lyman Kinne to purchase and pay for. All the elements which constitute an estoppel *in pais* exist here—the statements to induce the purchaser to buy—reliance upon them—and pecuniary injury to the party so relying on them, if the maker of them be permitted to controvert them and set up title in himself.

We are aware that there have been decisions questioning the extension of this doctrine of estoppel *in pais* to affect the title to lands. Such seem to be some of the decisions in New York in 1 Hill 14, and 6 Hill 17. But a summary of the decisions in

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the notes to Smith's Leading Cases, 1 Vol., p. 538, shows that the great weight of authority is consonant with the views we have here expressed. All concur that such facts constitute an estoppel as to personal property, and upon reason and principle to prevent fraud and promote justice, the same rule should be extended to real property.

2. The second question is,—is the grantee of Henry Shaw, holding under a quitclaim of his right and title to the property, and getting his title through Henry Shaw long after the deed to Lyman Kinne, also estopped. It is claimed for him that he was not privy to the statements, and that, when he bought, Henry Shaw had procured from the railroad company a lease of the land, and was the apparent owner of record. If the case rested solely here, we should doubt as to the reasonableness of estopping him, because he held through Henry Shaw's title, and took only the right and title he had—that appearing of record to be title to the whole instead of half.

But when he took his deed the defendants were in possession under Marvin & Van Alstyne's title, derived from Lyman Kinne, and claiming to hold possession of half, and paying half the rents under that title, and claiming the right of Henry Shaw to such half of the land. Now this claim and possession under the Lyman Kinne title was notice to him, and put him on inquiry, and affected him with knowledge of all the facts which he would have ascertained if he had inquired of the tenants in possession.

We need not refer to the frequent decisions of our state courts illustrating this principle. We deem it applicable here, and that the plaintiff must be deemed a purchaser with notice of the claim and possession under the Lyman Kinne title, and taking only the right and title of Henry Shaw, subject to the title of Lyman Kinne precisely as Henry Shaw held his title.

As this view of the case affirms the judgment, we need not consider the other questions in the case.

Judgment affirmed.

Harmon v. Harwood and Trustee.

AUSTIN HARMON v. ELIZABETH HARWOOD, AND TRUSTEE
LOVINA HARWOOD.

Trustee Process. Justice of the Peace. Jurisdiction.

In a trustee process, brought before a justice of the peace, whether before the justice or in the county court on appeal, a trustee who makes no disclosure will be held chargeable for the amount of the judgment against the principal debtor, though such judgment, by reason of the allowance of costs, exceeds one hundred dollars.

TRUSTEE PROCESS. This case was originally commenced before a justice of the peace, by whom judgment was rendered for the plaintiff for \$92.32 damages and \$4.09 costs against the principal debtor. The trustee made no appearance before the justice, and she was defaulted and adjudged chargeable for \$96.91, the amount of the judgment against the principal debtor. The principal debtor appealed to the county court. At the term of the county court when the appeal was entered, the trustee made no appearance. The cause was at that term continued. At the next term an appearance was entered on the docket for the trustee, but no disclosure or declaration by the trustee or her counsel was ever filed in the cause. After several continuances a judgment was finally rendered for the plaintiff against the principal debtor for \$100 damages and \$35 costs, and the judgment of the justice of the peace against the trustee was affirmed, and the trustee adjudged chargeable for the amount of the judgment rendered by the county court against the defendant. To this judgment against the trustee, she excepted.

T. Sibley and J. B. Meacham, for the trustee.

A. B. Gardner, for the plaintiff.

ALDIS, J. By the 79th section of chapter 32, Comp. Stat., relating to the trustee process, a justice has jurisdiction when the sum in demand does not exceed \$100. This follows the language of the statutes giving jurisdiction to justices in civil suits. It seems to give the power to render just the same judgment against the trustee that they have against a defendant.

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And it seems reasonable that the power to render a judgment against the one should be co-extensive with the other. If so, a justice may render a judgment against a trustee for the amount of damages and costs recovered against the principal debtor. But as the damages can not exceed \$100, so the trustee can only be held liable for \$100 damages and costs.

But for the \$100 damages and for the costs, the trustee may be adjudged liable, though such costs when added to the damages shall exceed \$100. By the appeal of the principal debtor the judgment of the justice of the peace against him was vacated, and hence the amount for which the trustee might be liable became uncertain. See sections 26 and 80 of chapter 32 of Comp. Stat. The trustee not appearing to disclose and limit the extent of his liability, he became liable "for the amount of the damages and costs recovered by the plaintiff *at the time the judgment was rendered* against the principal defendant," sec. 26 Comp. Stat., chap. 32. If the trustee had reason to fear that the accumulation of costs in the suit between the plaintiff and the defendant would rise to a larger sum than she owed the defendant, she should have limited the extent of her liability by disclosure; and in the absence of such disclosure the court could only render the judgment they did.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM,
AT THE
FEBRUARY TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.
HON. ASAHIEL PECK,

Wooley v. Edson et al.

HIRAM WOOLEY v. JOHN EDSON AND LUCIUS W. ADAMS.

Estoppel. Sale. Attachment. Creditor. Bailment. Action.

It is an essential element of an estoppel *in pais*, that the act, declaration or omission, which is claimed to constitute the estoppel, *actually induced* the other party to pursue a different course of action from what he otherwise would have pursued, and which, unless the estoppel is sustained, would prove injurious to him.

If the owner of personal property, which is in the hands of a third person, propose to sell it to another at a certain price, to be applied upon the vendor's indebtedness to the purchaser, it being understood that the adjustment of their accounts shall be made at some future time, and this proposition is accepted by the other party, and it is agreed between them that the person in possession shall be notified of the trade, the ownership of the property, as between the vendor and purchaser, passes by the bargain.

But as to the vendor's creditors, the property will still be liable to be attached as belonging to him, until the party in possession is notified by the purchaser of the sale, and, in some cases, has been requested by him to keep the property for him.

It seems, that when property is sold while in the possession of a third person, a request by the purchaser to the bailee, to hold it for him, is necessary to perfect the sale as to the creditors of the vendor, only when the party in possession is a naked bailee, with no right of retention of the property.

POLAND, CH. J.

One does not stand in a position to assert the peculiar rights of a creditor of a vendor to attach personal property sold without a change of possession, who commences a suit against the vendor and attaches the property in question, but afterwards abandons his attachment and suffers the property to go into the possession of the vendor, who then sells it and pays the attaching party's claim from the proceeds.

The special owner of property in his possession may recover its value from another who wrongfully takes it away from him, and the wrong doer can not ordinarily defeat the action, or reduce the damages by proof that some other person is the general owner, unless he shows some connection with the general owner, so that he can stand upon his right, or that the property has really gone to his use.

TRESPASS for taking a yoke of oxen. The case was referred, and the referee reported the following facts:

"In April, 1859, Azro M. Wright, being the owner of a pair of oxen, sold them to Hiram Wooley for \$118 on condition that

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they were to remain the property of Wright till paid for, and Wooley to have till winter to pay for them, and Wooley took possession of the oxen. In a week thereafter, Wright being indebted to Lewis S. Eddy, proposed to sell to him his interest in the oxen for \$113, Eddy then knowing the terms on which Wooley held them. Eddy agreed to Wright's proposition. Neither Eddy nor Wright knew at this time precisely how the accounts between them stood, but both believed that the amount due from Wright to Eddy was at least \$113, and such I find to be the fact. Wright and Eddy then contemplated an early settlement, bringing these oxen into the accounting, but they have never in fact adjusted their accounts nor has Eddy ever given Wright any credit in writing anywhere for the oxen.

Eddy and Wright then further agreed that each should notify Wooley, and accordingly about the middle of May, Eddy told Wooley that he had purchased Wright's interest in the oxen, and to pay him for them when he paid any one: Wooley replied, "Very well, it makes no difference to me whom I pay, if I can have the time agreed on," to which Eddy answered, "You can have the same time, and longer too, if you wish." Wright never gave Wooley any notice in relation to the subject.

On the 28th of the same May, about ten days after Eddy's notice to Wooley, Wright being in failing circumstances, notified Lucius W. Adams, a creditor of his, and now one of these defendants, of that fact, and told him that he had a pair of oxen at Hiram Wooley's and advised him to attach them. Whereupon Adams procured a justice writ and had John W. Edson, the other defendant, duly authorized to serve it, and directed him to attach the oxen; Edson took the writ, and John W. Stearns with him as an assistant, and went to Wooley's, arriving there very early in the morning of Saturday, May 29th, 1859, and calling Wooley up asked him if there was a pair of oxen there belonging to Azro Wright. Wooley replied there was; Edson then said that he had a writ in favor of Adams against Wright, and wanted to attach the oxen.

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All three then went to the barn and Wooley turned the oxen out, and Edson asked Wooley to lend him a yoke, promising to return it safely, and saying that he might have trouble in driving them home unyoked. Wooley got the yoke and yoked the oxen, and about the same time said to Edson, "I don't know as I ought to let the cattle go, for Mr. Eddy notified me to pay him for them when I paid any one." To which either Edson or Stearns replied, "We think we have a better claim to them than Eddy has," and they drove the cattle off.

Subsequently, and before the return day of the writ, Wright, with Adams' consent, sold the oxen and with the proceeds paid Adams' claim, and Edson never made any return on the writ, and no judgment was ever rendered thereon.

Wooley during all this interview asserted to claim to the oxen himself, and did not intimate to Edson, nor his assistant that they were interfering with his rights, nor that he had any objection on his own account, to their taking the oxen.

Both Adams and Edson knew that the oxen were in Wooley's possession under a contract of sale conditioned that they were to remain Wright's property till paid for—but there is no evidence tending to show that they knew that Wooley had, or claimed to have, any time of credit to pay for them—nor that they knew that Eddy claimed any interest in them, except what Edson might infer from Wooley's remark, hereinbefore stated, while the cattle were being yoked.

Wooley saw Adams the next Monday and then claimed some damages for the loss of the use of the oxen, and Adams then understood that Wooley claimed to have had the right to the possession of the oxen till winter.

Several interviews took place between Wooley and Adams, which did not result in any settlement, and shortly before the bringing of this action, Wooley at Eddy's request, gave him a power of attorney to bring this suit in his name, at Eddy's expense, with the agreement that Eddy should pay to Wooley ten dollars from the amount of damages recovered, and retain the remainder for his own use. Immediately on the execution of

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the power of attorney, Eddy said to Wooley that he had just as lief pay the ten dollars then as after recovery of judgment, and offered Wooley ten dollars which Wooley received, and thereafter this suit was brought by Eddy's direction in Wooley's name; and it was conceded on the trial that notice was duly given by Eddy to the defendants, when the writ was served, that the suit was for his benefit.

The value of the oxen at the time of their taking by the defendants, including interest to the day of the hearing before the referee, is \$122.37.

The damage to Wooley, for the loss of the use of the oxen, from May 29th, until the next winter, including interest, as above stated, is \$11.20.

If the plaintiff is entitled to recover on the facts stated, his damages are assessed at one or the other of the above sums, according to the rule the court may adopt.

Both defendants and John W. Stearns testified as witnesses in the case, and there was no evidence except as hereinbefore stated, tending to show that the action of Edson at the time of the taking of the oxen at Hiram Wooley's was, or was not, influenced by anything that Wooley said or did, or omitted to say or do, on that occasion, nor was the attention of either three witnesses called to the subject.

In making this statement, which is done at the request of the plaintiff, the referee does not mean to find any fact contrary to what may be held to be a legitimate inference from the occurrences at Wooley's at the time of the taking, but only that no witness testified as to what influence any act or omission of Wooley had upon his conduct, and that no question was asked any witness on that subject.

The sale of the oxen by Wright with Adams' consent hereinbefore stated, was after the interview between Wooley and Adams hereinbefore mentioned, as having taken place on the Monday after the taking by Edson of the oxen."

Upon this report the county court, at the April Term, 1861, KELLOGG, J., presiding, rendered judgment for the plaintiff, *pro forma*, for the largest sum reported by the referee, to which the defendants excepted.

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A. Stoddard and H. E. Stoughton, for the defendants.

C. B. Eddy and Charles N. Davenport, for the plaintiff.

POLAND, CH. J. The defendants claim that the plaintiff, by reason of what he said and did at the time the oxen were attached and taken out of his possession by the defendants, and his omission at that time to assert any title or right to the oxen in himself, is now estopped from asserting any title in himself against the defendants.

A satisfactory answer to this claim is found in this, that the case fails entirely to show that the defendants in making the attachment of the property, or in the subsequent disposition of it, were in the slightest degree influenced by what the plaintiff said or did, or omitted to say or do, or that they were in any manner prejudiced thereby. In all the cases which are to be found upon this subject of *equitable estoppels*, or as more commonly expressed, *estoppels in pais*, this is held to be the essence and reason of the whole doctrine; that where one by his act or statement or conduct, has induced another to act upon it, he can not afterwards be permitted to assert the contrary to the injury or prejudice of the party who has already acted upon the faith and in the belief created by him. To allow him to do so, would countenance a direct fraud. The referee reports that there was no direct proof that the defendants were influenced in their course, by what the plaintiff said or did, or omitted to say or do, unless that is a legitimate inference from the transaction itself. We think no such inference arises, but the contrary. Before the interviews between the plaintiff and the defendants, Adams, the creditor, had procured his writ against Wright, for the very purpose of attaching these oxen, and had procured Edson, the other defendant, to be authorized to serve it, and sent him to the plaintiff's house with directions to attach these oxen. It does not appear that Edson was directed to make any enquiry of the plaintiff, as to the ownership of the oxen, or whether he had any right in them, or that his course was in any manner to be governed by what he might learn from the plaintiff. His directions were imperative to attach the oxen as the property of Wright. The inquiry

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that Edson made of the plaintiff seems not to have been made with any view to obtain information as to Wright's title, or the plaintiff's title, but rather as a mode of introducing his business to the plaintiff, and perhaps to learn where the oxen were, or to identify them. The plaintiff was only informed that Edson was then clothed with legal authority for the purpose of attaching the oxen as Wright's property. He could not, of course, prevent him from doing so, and had no reason to suppose his purpose would be changed by any statement of his interest in the oxen. There is still less reason for believing that the defendants were deceived by the sayings, acts or silence of the plaintiff, when it is found that the defendants had previously full knowledge that the plaintiff had purchased these oxen conditionally, and then had them in possession under that contract. The inference would be if the oxen still were in his possession, that the time had not expired, and that the contract was still in force. Knowing what the defendants did, they knew enough to put them on enquiry as to whether the contract had expired, and if they omitted to inquire, they only are in fault for remaining in ignorance. When the fact of the plaintiff's interest was communicated to Adams a day or two after the attachment, it created no surprise, and received no attention whatever.

From the details of the transaction given by the referee, we are well satisfied, that the defendants' conduct was not in any manner changed or influenced by the plaintiff's conduct, declarations, or silence, and therefore he came under no estoppel on account of them. We have no occasion to consider any of the other answers the plaintiff has given to this claim of the defendants.

If the plaintiff is not precluded from any recovery by the estoppel, then it is conceded that the plaintiff is entitled to recover damages to the extent of his interest in the oxen, at the time the defendants took them, but the defendants claim he can not recover the whole value of the oxen.

1. Because Wright at the time was the general owner of the oxen, and he received the oxen from the defendants, which would be a satisfaction of his interest.

2. The defendants claim that if Eddy was the general

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owner at the time, the defendants are liable to him for his interest in the oxen, and that if the plaintiff recovers the whole value from them, they may be compelled to pay for Eddy's interest twice.

If, from the facts reported, Wright is to be regarded as the general owner of the oxen when the defendants took them, then it is clear that the plaintiff can only recover of the defendants for his interest in the oxen, as the oxen went subsequently to the use and for the benefit of Wright, and by his own consent.

But in our judgment, this is not a tenable proposition. Wright proposed to sell his interest in these oxen to Eddy for \$113, and have it apply upon Eddy's account against him, which was of a greater account, and have their price adjusted in a subsequent settlement of their accounts. Eddy accepted the proposition thus made him, and the bargain was thus fully consummated and complete. No actual delivery could be made by Wright to Eddy, because the possession, and right of possession for the time being, were in the plaintiff. All that could be done was to give him notice of this change of the ownership. It was agreed between Wright and Eddy, that each should notify the plaintiff, and Eddy did so, but Wright did not. We do not regard this notice, as the defendant's counsel have argued, as a condition to be complied with, before the title passed under their agreement, or that it was so understood or intended by the parties to it, but for the purpose of having the plaintiff made fully acquainted with it for his and their protection. Until such notice to the plaintiff, he would be justified in dealing with Wright as the general owner, and so might the creditors of Wright. We can see no good reason why, as between Wright and Eddy, the property did not pass to Eddy by the bargain. The price was agreed upon, and was paid by the agreement of the parties that it should apply on Wright's indebtedness; it was agreed the plaintiff should be notified, which was all the delivery that could be made, and nothing more remained to be done on either side, to render the bargain complete and effectual between the parties.

But the defendants claim that if the property passed as

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between the parties, the sale was still inoperative and void as to Wright's creditors, because what was done did not amount to a sufficient change of possession; that though Eddy notified the plaintiff that he had purchased and become the owner of, the oxen, the plaintiff did not agree to hold them for, or under, the plaintiff, which is claimed to be necessary in order to prevent creditors of Wright from taking the property.

The cases in this state, on the subject of what is necessary on the sale of personal property, at the time in the possession of a third person, in order to make such a change of possession as will prevent the seller's creditors from attaching it, seems rather confused, and contradictory. In some of them it is decided, that notice to the person in possession by the purchaser is sufficient, while others, and perhaps the later ones, seem to require that the person having possession, should also assent to become the bailee of, and keep the property for, the purchaser.

When the person in possession has no right or interest in the property himself, and is the mere keeper or custodian of the property for the owner, there would seem to be some propriety in requiring that he should assent to become the keeper, or bailee, of the purchaser. He can not be compelled to enter into that relation with the purchaser unless he chooses to, and if he refuses to do so, and the property is by the purchaser allowed to remain in his hands, he may properly be still considered as keeping it for the original owner of whom he received it, and that it is still legally in his possession.

But when the person having the possession has a right of possession in himself, and is not a mere naked bailee, the purchaser has no choice; all he can do is to give him notice, and if the person in possession declines to enter into any stipulation with him as to keeping the property for him, and stands upon his own rights under his contract, the purchaser can not take away the property, but must leave it in his possession. In such case it would seem that mere notice should be enough.

But it is not necessary to decide this, for the defendants are not in a position to assert any peculiar rights of a creditor for

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want of a change of possession. The defendants attached the property on a writ against Wright, but the attachment was immediately abandoned, and Wright was allowed to take the property and dispose of it. The defendants, therefore, not having pursued their process, but abandoned it,*do not stand in the place of creditors, but in the place of Wright, and can no more object to the validity of the sale for want of a change of possession, than Wright himself could.

But the defendants say that if Eddy was the general owner of the oxen, with whom they have no connection or privity, and who has no portion of the avails of the oxen, still they claim that the plaintiff can only recover to the extent of his interest, and not the full value, because they say his recovery of the whole value would not preclude Eddy from subsequently suing them and recovering for his interest in the oxen. Mere possession of property is said in all the books to be a sufficient title to enable the possessor to recover its value from another, who wrongfully takes it away from him, and the wrong doer can not ordinarily defeat the action, or reduce the damages, by proof, that some other person is the true owner, unless he shows some connection with the owner, so that he can stand upon his right, or that the property has really gone to his use. All the cases seem to agree in this result, but different reasons are given for it. In some of the cases, especially in Massachusetts, the person in possession, or having a special property merely, is allowed to recover the whole value, and it is put upon the ground of his liability over to the true owner, or general owner. In other cases, this reason is wholly discarded, and it is said that the assent of the general owner will be presumed, to have the action brought and the whole damages recovered by the possessor, or special owner, unless the defendant connects himself with him in some way, or such owner himself interferes to assert his own right, and that if the general owner does not interfere, but allows the suit by the possessor or special owner to proceed to judgment, and the full damages to be recovered, he can not afterwards sue. These latter views are fully adopted by a late case in this state, *White et al. v. Bascom et al.*, 28 Vt. 268, and we must regard it as conclusive of the law on this point.

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Wright having parted with all interest in the oxen to Eddy, the defendants stand, as tortious tokens of the property, and, being in no way connected with Eddy, can not set up his right, even to reduce the damages. As the case shows this action brought for the benefit of Eddy, there would seem but small reason to turn the parties over to another suit, even if the general rule were otherwise settled.

Judgment affirmed.

GEORGE B. CHURCH v. ALANSON G. CHAPIN.*Conveyances void as to Creditors. Consideration. Judgment.*

The conveyance by a debtor of all his attachable property for not more than half its value, is void as to existing creditors, on the ground of inadequacy of consideration.

Neither does the fact that the grantee engages, as an additional consideration of the grant, to support the grantor during life, render the conveyance valid as to creditors.

Quere, whether the agreement by the grantee with the grantor to pay to a third person a sum equivalent to the value of the property conveyed, (which sum the grantor designs as a gift to such third person,) constitutes a valid consideration for the conveyance of all the grantor's attachable property, as against his creditors.

The question whether a debtor who conveys property without such a consideration as is valid against creditors, reserves sufficient property for the payment of his existing debts, so as to prevent the conveyance from being void, depends on the amount and nature of the property, in connection with its character and situation, in reference to the facilities it affords creditors for collecting their debts.

The reservation by the debtor merely of cash on hand and debts due him from out of the state, so that they can not be attached by the trustee process, though amounting in the aggregate to the sum of his debts, will not suffice to render valid a conveyance which, without any reservation of property, would have been invalid as to creditors.

In order to entitle a creditor to impeach a conveyance of his debtor for want of sufficient consideration, where there is no fraud, it must appear that he

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was a creditor at the time of the conveyance, and a judgment in his favor against the grantor, founded on a debt due at that time, is not conclusive against the grantee, unless he was a party to it directly, or appeared and defended the case in his own behalf to protect the property conveyed to him.

A judgment is conclusive, even between the parties, only of such facts as must have been found, in order to warrant the judgment.

EJECTMENT. The plaintiff claimed title under a warranty deed from one Fortin Church to him, dated October 29th, 1855.

The defendant offered in evidence certified copies of the record of a judgment in favor of one Deborah Church against Fortin Church, rendered in 1858, for \$524.50, for which sum execution issued May 4th, 1858; also, a copy of this execution and the officer's return thereon, showing a levy of the same upon the premises in question; also, a warranty deed from Deborah Church to the defendant Chapin, dated April 4th, 1859, to all of which the plaintiff objected, but the court admitted them, and the plaintiff excepted.

It appeared in evidence that at the date of the deed from Fortin Church to the plaintiff, Fortin Church was a single man, without issue, and of about sixty-four years of age; that at the time of the execution of the deed, Fortin Church also executed, under seal, a bill of sale to the plaintiff of all his personal property, except clothing, cash on hand and debts due; and at the same time the plaintiff executed to Fortin Church a mortgage deed of all the real estate described in the deed of Fortin Church to the plaintiff, conditioned for the payment of certain debts of Fortin Church, amounting to about \$850, for the payment to certain nephews and neices of the said Fortin, (twenty-eight in number,) of \$100 each, and for the maintenance, care and support of the said Fortin Church during his natural life. The plaintiff was a nephew of Fortin Church, and immediately took possession of the personal property conveyed, and entered upon the support of Fortin Church. The conditions named in the mortgage constituted the consideration of said conveyance. There was no provision that the plaintiff should pay the debt of Deborah Church, nor any evidence that the plaintiff or Fortin Church at the time of the conveyance

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supposed she had a debt against Fortin Church; but they were both aware that she claimed that Fortin Church was indebted to her, and that was a subject of conversation between Fortin Church and the plaintiff at the time.

It appeared that said judgment was recovered for the personal services of Deborah Church for Fortin Church as his housekeeper from 1850 to the spring of 1855; that Deborah was a single woman of between fifty and sixty years of age, without any other home, and that the plaintiff, though knowing to the fact of Deborah Church's working for Fortin Church, supposed that she was making it her home with her brother, Fortin Church, and did not suppose that she was at work for pay. There was no evidence tending to show that said conveyance was made for the purpose of defrauding Deborah Church, or that there was any intentional fraud on the part of the plaintiff or Fortin Church.

The plaintiff offered evidence to prove that at the time of the conveyance to him no actual indebtedness to Deborah Church from Fortin Church existed, to which the defendant objected. The court rejected the evidence, to which the plaintiff excepted.

It appeared in this connection that Deborah Church's suit was commenced in August, 1856, and was defended throughout by the plaintiff, as agent of Fortin Church, and in consequence of his taking the conveyance of Fortin Church's property.

It appeared that at the time of the conveyance from Fortin Church to the plaintiff, the cash on hand and debts due, reserved by Fortin Church in said bill of sale, consisted of \$100 cash on hand, a debt of about \$200 against one Bardwell, of Walpole, New Hampshire, a note of \$75 against James Church, of Townshend, Vermont, notes against the Stones, of Westminster, Vermont, of about \$300, a note against one Sawtell, of Bellows Falls, of about \$400, and notes against men by the name of Phillips, in the state of New York, then amounting to about \$1100. All of these debts were considered good except the note against Sawtell. The notes against the Phillipses were secured by mortgage in New York, and were intended to be made a gift to the sons of his sister, their mother, by Fortin Church, and were soon after so disposed of. The plaintiff had

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nothing to do with these debts due or cash on hand, except that it appeared that there were other debts against Fortin Church, amounting to about \$200, not mentioned in said mortgage, which the plaintiff afterwards paid at Fortin Church's request, and Fortin Church gave him notes sufficient to pay him for so doing. It appeared that it was the understanding between the plaintiff and Fortin Church that the plaintiff was to have all of Fortin Church's personal property at Fortin's decease, and they supposed the last clause in the bill of sale was sufficient to convey said debts and personal property at Fortin Church's decease.

The court intimated an opinion to the plaintiff's counsel that the conveyance to the plaintiff by Fortin Church, being a disposition of his property to collateral relations, and to secure his own maintenance, must be treated, in law, as a voluntary conveyance, and that as the claim of Deborah Church existed prior to the conveyance and was known to both parties, and subsequently matured into a judgment after full defence made by the plaintiff, it became conclusively, as to him, a prior existing debt of the grantor, which would render the conveyance inoperative as to her, notwithstanding the plaintiff might have acted in perfect good faith in the whole transaction, and that the amount and kind of property retained by the grantor, as above stated, could not be properly regarded as an ample proportion of his estate for the security and indemnification of his creditors, and that the title of Deborah Church thus acquired must be regarded as paramount to that of the plaintiff. Whereupon the court directed a verdict for the defendant, and the plaintiff excepted to the foregoing decision.

Stoughton & Grant, for the plaintiff.

P. T. Washburn, for the defendants.

PECK, J. The question in this case is which of these parties acquired the better title from Fortin Church. The plaintiff shows title by deed from Fortin Church, dated October 29th, 1855. The defendant shows title by levy of an execution in favor of Deborah Church against Fortin Church, in 1858, for

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between \$500 and \$600, issued on a judgment recovered in 1858, in a suit commenced in 1856, and by deed from Deborah Church to the defendant, dated April 4th, 1859. Nothing appears invalidating the deed to the plaintiff as against Fortin Church. The question is whether it is good against his creditors, or rather against the creditor under whose levy the defendant claims. The case finds that in the execution of the deed to the plaintiff there was no fraud in fact, or actual intent to defraud creditors generally, or to defraud this particular creditor. Assuming for the present that Deborah Church was a creditor of Fortin Church in respect of the debt or claim for which she levied, at the date of Fortin Church's deed to the plaintiff, the question arises whether upon the facts stated in the exceptions, the amount, nature and character of the consideration of that deed was such as to render it valid against Deborah Church as such creditor, or whether as to her and the defendant who has her title, it is to be treated, as the county court treated it, as a voluntary conveyance and inoperative against her levy. On reference to the judge's minutes of the testimony referred to, and the deed and bill of sale, it appears that the amount of property conveyed to the plaintiff by Fortin Church on that occasion was, in round numbers, from \$7,000 to \$10,000. The consideration for this property is all expressed in the mortgage deed from the plaintiff to Fortin Church, from which it appears that the plaintiff was to pay certain specified debts of his grantor, amounting to about \$850, and pay to the children of certain persons named \$100 each, as they should respectively arrive at the age of twenty-one years, and also support Fortin Church during his natural life. It appears there were twenty-eight of these children, who were the nephews and nieces of the plaintiff's grantor. If the \$850 and the \$2800 constituted the whole consideration for this property, it would be regarded as so far below the real value of the property as to render the conveyance void as against existing creditors, on the ground of inadequacy of consideration. A debtor can not give away his property, and thereby deprive his creditors of all means of collecting their debts. He must be just before he is generous; or in other words, he must not be generous at the expense of justice to his

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creditors. If such is the effect the gift is void as to creditors. Nor can this principle be avoided by having a partial consideration. In such case the gift is equally void, at least to the extent of the want of consideration. But in this case there is a further consideration, the agreement of the plaintiff to support the grantor during life. The amount or value of this part of the consideration is in its nature so uncertain, depending so much on future contingencies, the duration of life and the future wants and requirements of the grantor, that it can not be assumed that the consideration was inadequate in amount. The question must turn upon the character of the consideration. The \$850 which the plaintiff agreed to pay to the two creditors named in the mortgage deed can not be objected to as to its character; and although the grantor in this disposition of his property made no provision for the payment of the debt to Deborah Church, she can not set aside that deed on the ground that the grantor gave preference to other creditors. Whether the \$2800 the plaintiff agreed to pay to the collateral relatives of the grantor should also be so considered, is not so clear. On the one hand it may be said that although it was a gift as between such relatives and the grantor, yet as between him and the plaintiff it was to be a payment, and that the want of consideration as between the plaintiff's grantor and the persons to whom the grantor required the plaintiff to make the payment, can not affect the deed. On the other hand it may be said that as the plaintiff was a party to this arrangement by which this grantor was giving away this portion of the consideration of the deed, and not having paid or legally bound himself to the donees to pay to them, he ought not to be allowed to stand upon this agreement with the grantor, and thus perfect the gift to the detriment of creditors, a gift which the grantor, as to creditors, had no right to make. But we do not find it necessary to decide whether this agreement to pay the \$2800 in the manner stipulated, is a good consideration to that amount as against creditors or not, because the remaining portion of the consideration, the agreement for support for life, is not of such a character as will sustain the deed if the creditors are thereby deprived of the means of collecting their debts. It is true that as between the parties to the

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deed it is a valuable consideration, and in this respect a deed founded on it differs from a gift; but as to creditors it is not different from a deed of gift. It has long been settled that a party can not either by gift or in consideration of an agreement for support for life, convey his property without reserving what is amply sufficient for the payment of his then existing debts. If we allow the plaintiff the benefit of the \$850 and the \$2800, as a good consideration to that extent, there is still, at the lowest estimate of the property, between \$3,000 and \$4,000 of the consideration accounted for in no other way than by the agreement for support. Where there is a partial, but not a full consideration good against creditors, whether the deed is voidable *in toto*, or only to the extent of the want of consideration, is a question not material in this case, as the amount of the consideration resting on the agreement for support exceeds the amount of the levy in question. The levy must prevail over the deed, unless the property of the grantor not conveyed is sufficient to prevent that result.

A creditor has no right to impeach a conveyance of his debtor on the ground that it was voluntary, or without sufficient consideration, unless it would operate, if allowed to stand, to his detriment in the collection of his debt. The debtor is bound to reserve property ample for the payment of his debts. Whether the property reserved is what will be deemed ample for this purpose does not depend entirely on the amount and value, as the real end to be accomplished is, that the deed or conveyance shall not deprive creditors of the means of collecting their debts. Hence the nature and situation of the property is to be regarded as well as the amount and value, in view of the facilities the creditors have left for the collection of their debts. In this case the debtor conveyed all his property except \$100 cash on hand, and debts due him. These debts amounted nominally to \$2,075, due from various individuals. The debt of \$400 against Sawtell may be thrown out, as Sawtell had failed and become insolvent. This leaves the amount due the grantor \$1,675. In relation to the Phillips debt of \$1,100 and the Bardwell debt of \$200, the debtors resided out of this state, so that they could not be reached by process in this state; as debts due from persons residing out

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of the state are not attachable by trustee process, except in some particular cases. The cash on hand was in point of law liable to attachment if so situated that an officer could obtain possession of it without committing a trespass on the person of the owner; but it is not probable that it would be accessible for the purposes of attachment so as to be available to a creditor, especially as the amount was so small. Deducting the \$400 debt as worthless, there was but \$375 of the debts reserved by the grantor that was attachable, and that only by trustee process. The grantor owed about \$200 besides this debt for which the levy was made and the debts the plaintiff agreed to pay. This \$200 the plaintiff paid, and it was repaid to him out of the debts the grantor reserved. There is another fact stated worthy of consideration; that is, at the time Fortin Church made the conveyance in question, it was his purpose to give the \$1,100 debt to certain collateral relations in the state of New York, where the debtor resided, and it was soon after so disposed of. The bill of sale to the plaintiff also professed to transfer all the personal property that Fortin Church might own at his decease, and the parties so understood its legal effect. The rule that a party who conveys his property without sufficient consideration, such as will be valid against creditors, must reserve property ample for the payment of his existing debts, is from its nature somewhat general and indefinite; and whether sufficient is reserved in a given case to answer this purpose, depends, as already stated, on the amount and nature, in connection with the character and situation, of the property in reference to the facilities it affords the creditors for collecting their debts. We think upon all the facts appearing in this case the conveyance must be regarded as invalid as against the levying creditor, if she was a creditor at the time of this conveyance, in respect of this debt. This conclusion is the more just since it appears that the grantee knew at the time he took the conveyance, that this creditor had rendered services for the grantor, and that she claimed he was indebted to her for such services, and yet he took the deed and bill of sale without any provision for the payment of this debt.

The only remaining question is whether the county court erred in excluding certain evidence offered by the plaintiff. The case

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states that "the plaintiff offered evidence to prove that at the time of said conveyance to him, no actual indebtedness to said Deborah Church from said Fortin Church existed" which was excluded by the court. If this offer is to be construed as an offer merely to show the time when the debt accrued, and that it accrued subsequent to the conveyance, the decision was erroneous, as the evidence would not necessarily tend to impeach the judgment. A judgment, even between the same parties, is conclusive only of such facts as must have been found to warrant the judgment. This judgment may be correct, and yet the debt not have existed till after the conveyance. But we do not so understand the offer. The offer evidently was to show that no debt ever existed on which the recovery was had, for the exceptions state that *it appeared* that the judgment was recovered for the services of Deborah Church (Fortin Church's sister) as his house-keeper from 1850 to the spring of 1855. The deed was not executed till October 1855. The offer therefore must be understood as an offer to show that the judgment was founded on no actual indebtedness, and not an offer to prove that the debt accrued after the conveyance. The evidence offered tended directly to impeach the judgment. The judgment is clearly conclusive on this point upon Fortin Church. But in order to entitle a creditor to impeach a conveyance of his debtor for want of sufficient consideration where there is no fraud, it must appear that he was a creditor, and a judgment in his favor against the grantor is not conclusive against the grantee who is no party to it. He may, as a general rule, show that the judgment was collusive, and not founded on an actual indebtedness or liability. But in this case the plaintiff can not be regarded as a stranger to the judgment, as it appears that the suit was defended by this plaintiff not only as agent of Fortin Church, but also in his own behalf to protect the property conveyed to him by the defendant in that suit. Under such circumstances the plaintiff can not be permitted again to try the question of indebtedness. He is bound by the result of that suit.

The judgment of the county court is affirmed.

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THE TOWN OF WILMINGTON v. THE TOWN OF SOMERSET.

Pauper.

A pauper who had a legal settlement in the town of Somerset and who was, at the time of the annexation of one part of that town to Wilmington and another part to Stratton, maintained as a pauper by Somerset, and hired to be kept as such in the town of Wardsboro, was held to be an *absent person* within the meaning of the 9th clause of the 1st section of the 17th chapter Compiled Statutes, (General Statutes, p. 132.)

Such pauper's settlement was held to be in Wilmington after such annexation, because her "last dwelling place or home" in Somerset before becoming a pauper of that town, was in that part of Somerset which was annexed to Wilmington, notwithstanding, after she became a pauper she was not kept in that portion of the town, but for awhile in another part of Somerset, and afterwards in Wardsboro.

A pauper, while supported as such, has no "home or dwelling place" within the meaning of the statute, (Comp. Stat. chap. 17 sec. 1, clause 2.)

APPEAL from an order of removal of one Thankful Sawtell, a pauper, from the town of Wilmington to the town of Somerset. Plea, that the pauper was unduly removed, and trial by the court at the September Term, 1860, REDFIELD, CH. J., presiding, upon the following agreed statement of facts:

"It is agreed between the parties that the pauper, Thankful Sawtell, was born in Brattleboro in 1792, and with her father, Richard Sawtell, removed to Somerset in 1795."

That Richard Sawtell, the father, came to reside in Somerset on that part of the town annexed to Wilmington by the act of annexation passed November 2nd, 1858, and resided there until his decease.

That Thankful Sawtell always resided in that part of the town annexed to Wilmington until after she became a town pauper.

That she was occasionally assisted by the town of Somerset from 1832 to 1844, when she became a town pauper and was wholly supported by the town.

From 1844 to 1855 she was supported by the town of Somerset at different places upon said territory annexed as aforesaid to Wilmington. In the spring of 1855 one King contracted to

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support and maintain her, and continued to support and maintain her until May, 1859.

In December, 1858, the overseer of Somerset paid King for supporting and maintaining her up to January 1st, 1859, at which time the act of the General Assembly annexing a part of Somerset to Wilmington, and a part to Stratton, took effect.

Thankful Sawtell remained with King until May 1859, when she wandered from Wardsboro, where King was then residing, and had resided for the year preceding, into that part of Wilmington annexed from Somerset, from whence she was removed by the order and warrant of removal, appealed from, to Somerset, 9th June, 1859.

It is further agreed that Richard Sawtell and Thankful Sawtell both gained a settlement in Somerset, and gained such settlement while residing in that part of Somerset annexed to Wilmington by the above mentioned act of the legislature.

It is further agreed that King in 1855, when he contracted to support Thankful Sawtell, resided in Somerset in that part of the town annexed to Stratton, and that he removed to Wardsboro in the spring of 1858.

Upon these facts, the county court decided that the pauper was duly removed, to which the defendant excepted.

Chas. K. Field, for the defendant.

S. P. Flagg, for the plaintiff.

PIERPOINT, J. The important question in this case depends upon the construction of the 9th clause of the 1st section of the 17th chapter of the Compiled Statutes, (General Statutes, p. 132,) relating to the settlement of paupers, in connection with the facts stated in the exceptions. In said clause it is provided that "upon the division of any town, or the annexation of a part of one town to another town, every person having a legal settlement therein, but being absent at the time of such division or annexation, and not having acquired a legal settlement elsewhere, shall have his legal settlement in that town, wherein his

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last dwelling place or home shall happen to fall, upon such division or annexation." It seems to have been the intention of the legislature by this enactment, to establish a definite rule, by which the controversies might be settled, that would be likely to arise upon the division of a town, or the annexation of a part of one town to another, as to the legal settlement and future support of the class of persons referred to. The rule is an arbitrary one, like all the laws relative to the support of paupers, consequently but little aid, in its construction, can be derived from the consideration of any principles of equity, or justice, that may be supposed to exist as between the several towns to be affected by it.

This statute makes no reference to the effect of such division or annexation upon those persons whose "dwelling place or home" is in the divided town, or in the annexed portion of a town, at the time of such division or annexation; but such persons are left to the operation of the general principle applicable to such cases. The rule established in such cases in the neighboring states, (as shown by the adjudged cases to which we have been referred in the argument,) whose pauper laws are similar to our own, seems to be, that such persons stand in the same relation to the town to which the territory in which they lived was annexed, as regards their settlement therein, as they occupied to the town from which such territory was taken, there being no express statutory provision on the subject. Probably a similar rule would be held to prevail here, but that point we are not now called upon to decide.

That part of the statute now under consideration applies only to that class of persons who, having a legal settlement in the town that is divided, or a part of which is annexed to another, are *absent* when the division or annexation takes place; and of such persons it is declared that they shall have their legal settlement in that town wherein their last dwelling place or home shall happen to fall. This statute will admit of no other reasonable construction than that the towns referred to, are those whose territorial limits are altered by such division or annexation; the indirect purpose was, to establish a basis upon which the settlement of this class of persons and the consequent burden of their support, if necessary, should be distributed between

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such towns after their boundaries are so changed, and that is accomplished by fixing their settlement in the one town or the other, according to the place where the last dwelling place or home of the absent person shall be found to have been.

It appears from the agreed settlement of facts, that the pauper, Thankful Sawtell, had a legal settlement in Somerset, at the time a part of that town was annexed to the town of Wilmington, and that she always resided and had her home in that part of the town of Somerset that was so annexed to Wilmington, until 1844, when she became a town pauper and was wholly supported by the town. From this time forward the town of Somerset continued to support the pauper, sometimes in Somerset and some of the time out of said town, until the 1st of January, 1859, when the act annexing a part of Somerset to Wilmington took effect. At that time she was living with one King in the town of Wardsboro, who was supporting her there for, and as a pauper of, the town of Somerset.

Upon these facts the question arises whether the pauper on the first of January, 1859, was such an absent person as is referred to in the statute, so that by operation thereof her legal settlement became fixed in that town within the then limits of which her last dwelling place or home was.

It is well settled that while she was being supported by the town of Somerset, she could not have a residence in any other place within the meaning of that term, as used in the statutes regulating the settlement of paupers. Her living in any other town, no matter for how long a period, would not give her a settlement therein. Her residence in contemplation of law would still be in the town from which she derived her support. She could not even "*come to reside*" in any other town while so supported there by the town of Somerset, so as to be made the subject of an order of removal.

Neither can such pauper, while in the charge of the overseer of the poor, and supported by the town of Somerset, have a "dwelling place or home," within the meaning of those words as used in that part of the statute now under consideration.

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The dwelling place or home here referred to is evidently one that the pauper has obtained, procured, or occupied, of his own will, or through some voluntary agency of his own, or that of connections or friends, a place of abode that can properly be called his, in the selection or enjoyment of which he may be supposed to have been a free agent, or at least one that he was allowed to occupy and enjoy as his home, independent of the *compulsory charity* of the town.

Paupers while in charge of the overseer of the poor, or being supported by the town, have no choice as to the place where they live. They abide where the town provides a place. They are wholly subject to the will and control of the overseer of the poor in this respect. There is no particular place that they can call *their* home. If one of the paupers of Somerset had been kept by the town on that part set to Wilmington, or if they had all been kept there in a poor house procured by the town for that purpose, the annexation would not transfer such pauper or paupers. Such a case then would be no such connection of the paupers with the territory by virtue of a residence there, or as being inhabitants of it, as is necessary in order that a transfer of the territory should operate to transfer their legal settlement in Somerset, or to transfer them as inhabitants of such territory, to the town of Wilmington. If their settlement is transferred at all, it must be by virtue of some other principle.

This point is fully decided in several cases in Massachusetts and Connecticut, which have been referred to in the argument, and it is not necessary to refer to them again here.

In this case the pauper was not upon the territory transferred, or within the town of Somerset, at the time of annexation, but was in fact in the town of Wardsboro.

That the pauper was absent from the town of Somerset on the 1st of January, 1859, in fact, must be conceded, but it is said that being a pauper and supported by the town, at the time, she is to be regarded in law as in the town and not absent, and that the statute has reference only to those persons who, having a legal settlement in a town, are absent therefrom, under such circumstances that a new settlement might be gained

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in another town by remaining therein a sufficient length of time. There is nothing in the statute indicating an intention to make any such distinction, or to show that the word "absent" was used in a limited or restricted sense, or that those who had become paupers were not subject to its operation, as well as those who might subsequently become so. If it had been the design of the legislature so to restrict its operation, it seems to us it would have been expressed, by some words of limitation, but instead of that, the language is of the most general and comprehensive character. "Every person having a legal settlement therein" are words that include those who are chargeable as well as those who are not. The words "not having acquired a legal settlement elsewhere" do not qualify the former words. In fact, that expression is wholly inoperative, for if a settlement had been gained elsewhere, then the former settlement was thereby lost, and the person would have no legal settlement in the divided town, and of course would not be within the statute at all.

The legislature by using the general word "*absent*" without qualification, to designate the class of persons referred to, and the words "*dwelling place or home*," to designate the place where the settlement is declared to be, seem to have intentionally avoided the use of all those words that have been restricted in their meaning in the construction of the laws relative to the settlement of paupers, and to have put the residence of the persons referred to, as regards their settlement, upon the broad basis, that all such persons who are out of the town at the time its territory is set off, living elsewhere and having no home within it, in fact, shall have their settlement in that one of the two towns within whose limits the place of such person's last dwelling or home shall be found, and that without reference to the place where such person resided in said town when the settlement was gained, that being a matter wholly immaterial, the sole object being to divide the burden of supporting the paupers of the town whose limits have been contracted, as between such towns and the adjoining town, whose limits by the same process have been enlarged, so far at least as the class of persons referred to are concerned.

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In this view of the statute, the settlement of the pauper, in this case, became fixed in Wilmington by operation of the act of annexation.

The judgment of the county court is reversed, and judgment entered that the pauper was unduly removed, and that the defendants have their cost.

ABIAL RICHARDSON, *appellant*, v. CAROLINE RICHARDSON AND
BARNA A. COOK, *executors of the last will of WARREN B.*
RICHARDSON.

Will. Witness. Evidence.

The executor of a will who takes no benefit under it, is a competent witness to its execution.

The declarations of a testator made after the execution of a will and on a different occasion, that he was induced to make the will by undue influence, are not admissible to prove the fact of such undue influence.

APPEAL from the decision of the probate court for the district of Westminster, admitting to probate the last will of Warren B. Richardson, deceased.

The cause was tried by jury at the September Term, 1860, REDFIELD, CH. J., presiding.

It appeared on trial that the instrument propounded was executed by the testator at Springfield, Vermont, on the 17th of September, 1857, in the presence of Henry Closson, Emily W. Closson, and Barna A. Cook, who subscribed their names thereunto as witnesses. The appellees having proved the execution of the will by the above named witnesses, proposed to read the same to the jury, but it appearing that Barna A. Cook, one of the subscribing witnesses, was also one of the executors named in the will, the appellants objected, but the court overruled the objection, and permitted the will to be read, to which the appellants excepted.

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The appellants also gave evidence tending to show that on the morning of the 16th of September, 1857, the testator's wife, Caroline Richardson, was heard to say to the testator, "You have put it off long enough, and now you have got to go to-day and have it made," that upon the witness entering the room said Caroline stated that she "had been telling Warren to go and have a truss made," to which the testator then made no reply; that while the testator was preparing to go that morning he asserted that he did not feel able to go, that he placed both his hands upon his abdomen and said he felt sore and lame and did not feel able to be about, that he appeared to walk with difficulty and shed tears; that he went to Chester that day and staid that night at the house of Barna A. Cook, and on the morning of the 17th of September Barna A. Cook accompanied the testator to Springfield and to the office of Henry Closson, when and where the will was executed; that on the morning of the 18th of September the testator (having returned to Chester the night before) went to the house of his brother Thomas, and then called out his brother Silas, who was then visiting there, saying to him, "Silas, I have got something on my mind that I want to tell you. I can not let you go back west without telling you how I feel and what I have done. I have made a will, and it does great injustice to father and mother. For myself I am satisfied with the law as it stands with reference to the disposition of property. I always intended that Thomas' children should have a part of my property. I am not satisfied with my will. I made it to satisfy my wife. I am liable to sudden death, and want you should remember this conversation, but I want you should keep this talk a secret, for if my wife or Cook's folks knew what I have said to you I shall have no more peace day or night. You heard what my wife said at Putney the morning I left. It was not a truss she was speaking about, but a will;" that during this conversation with Silas the testator was greatly affected and shed tears.

The evidence also tended to show that after the execution of the will in controversy, he was depressed in spirits, was more reserved and less sociable than before; that he was heard talking to himself and gesticulating when no one was supposed to

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be within hearing or seeing distance, and that this condition of things continued to exist until April, 1858, when he committed suicide.

At this stage of the case the counsel for the appellant stated to the court that they had no further testimony by which to prove the fact of the exercise of undue influence by the wife of the testator or by Cook, in procuring the execution of the will, except testimony of the same character as is above set forth, and that they did not consider that there was any testimony in the case tending to show such fact of undue influence, which it was profitable to argue to the jury, except the declarations of the testator, made after the execution of the will, and not on the same occasion, and the court having intimated that they should charge the jury that the testimony of such declarations was not competent evidence to establish the fact of the exercise of such undue influence, the appellant submitted to a verdict, affirming the decree of the probate court, with leave to except upon this point.

The appellant in opening his defence to the jury stated that he should rely solely upon the fact of the will being procured by the undue influence of the wife of the testator and Barna A. Cook.

P. T. Washburn, for the appellant.

H E. Stoughton, for the executors.

¶ **POLAND, CH. J.** The first question, whether an executor, who takes no benefit under a will, is a good witness to its execution, seems very well settled by authority.

It was so decided in *Sears v. Dillingham*, 12 Mass. 358, where the precise point was before the court, and under a statute identical with our own. It is said by CH. J. PARKER in that case, that such is the English rule. And it seems to have been settled so in the case of *Phipps et al. v. Pitcher*, 6 Taunt. 220, (E. C. L. 1 Vol. 363,) which was a case sent to the court of common pleas from the court of chancery for their opinion on the point. The point is decided in the same way in Connecticut; *Cornstock*

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v. *Hoddyson*, 8 Conn. 254. Also in New Jersey; *Dew v. Allen*, 1 Pennington 35. Also in Virginia; *Coalter v. Bryan*, 1 Gratton 18. Also in Pennsylvania; *Vansant v. Boileau*, 1 Binn. 444. The only case cited by the plaintiff as supporting the contrary is that of *Barrett v. Silliman*, 16 Barb. N. Y. Sup. Ct. 198, a case decided by the supreme court of the third judicial district in New York. HARRIS, J., who gave the opinion in that case, states that by the common law the executor is not a competent witness to a will, but he cites no English case or author, to sustain him. He quotes a case from South Carolina, *Taylor v. Taylor*, 1 Rich. 531, and two cases from North Carolina, *Tucker v. Tucker*, 5 Iredell 161, and *Allison's Executors v. Allison*, 4 Hawks. 141, to show that in those states, an executor is held not to be a competent witness to a will. But in a note by Judge PERKINS to Jarnan on Wills, 1 Vol. p. 66, these cases are cited, and it is stated that they decide that the executor is a good witness to a will disposing of real estate, but not to a will of personalty, because the statutes of those states give an executor commissions upon the personalty, placing the executor much upon the same ground as a legatee under the will. With this explanation of these cases, they afford very little authority for the plaintiff's position under our statute.

It is held by Judge HARRIS in the same case, that the executor may be rendered a competent witness, by his renunciation of his executorship. It is not very apparent how this could be, if he was not a *credible* or *competent* witness at the time, by reason of his then having an interest under the will by being named as an executor therein, for all the authorities now agree, that the validity of the will in this respect, depends upon the competency of the witness at the time, and not when the will is propounded, and this seems to stand on the soundest foundation in reason.

The executor was offered as a witness to establish the execution of the will, and rejected, although he offered to renounce his executorship, because he was also a trustee under the will of the bulk of the estate, and therefore interested to have the will sustained.

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The decision excluding the executor as a witness at the trial, was proper enough for aught we can see. In *Sears v. Dillingham*, 2 Mass., the executor was rejected as a witness on the trial, as the court held, that being a party to the record he might be liable for costs, but that his interest arose from the liability he had taken upon himself, and not from any benefit he derived under the will.

Notwithstanding what is stated by Judge HARRIS, as to the executor not being a competent witness to the will, and after he was rejected as a witness at the trial, no question seems to have been made that the will was invalid by reason of not having been attested by a sufficient number of competent witnesses, and the court proceed to dispose of the case upon other questions, and the will was finally held invalid on two grounds: want of sufficient capacity in the testatrix, and because it was not declared by her to be her will in the presence of the witnesses, as the New York statute requires.

The questions decided appear to have been properly disposed of, but it appears they were not all treated in the most logical way by Judge HARRIS in his opinion.

If the question were new, we see no good reason why the executor is not a *credible* or *competent* witness to a will, under which he takes no interest, but is named as executor. It is at the time altogether contingent and uncertain whether he will ever be called upon to perform the duty of executor. He may die before the testator. The testator may revoke the will, or make a new one, and appoint another executor. But if it be regarded as settled at the time, that he is to be executor, the only interest he can be said to acquire is to perform a service, for which he is to receive a bare compensation, just in proportion to the service performed. This can hardly be regarded as a legal interest, by any rule that has ever been recognized in the law.

If a fixed per cent. were given by law, irrespective of the actual services performed, it would be quite a different case.

The other question, as to the effect of the testator's declarations after the execution of the will, that he was induced to

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make it by the influence of his wife, was fully settled in the case of *Robinson v. Hutchinson*, 26 Vt. 38, upon a very full argument, and great consideration, and we think upon grounds satisfactory both in reason, and upon authority.

The judgment is affirmed, with costs in this court, and ordered to be certified to the probate court.

RUEL L. WINN v. JONATHAN SPRAGUE, *appellant*.

Book Account. Contract. Practice. Supreme Court. Parent and Child.

The defendant's cattle having trespassed upon the plaintiff's land and damaged his crop of oats, through the defect of a division fence which both parties were under an equal obligation to keep in repair, the defendant told the plaintiff that he would allow him what was right for the oats when they came to settle. *Held*, that this was not sufficient to warrant a recovery by the plaintiff in book account for the damage to the oats.

The plaintiff hired out his minor son to the defendant, and while he was at work for the defendant, the plaintiff remarked to the defendant that he (the plaintiff) should let his son have half his wages. *Held*, that these facts did not constitute any implied authority from the plaintiff to the defendant to pay the amount of the boy's wages to the boy himself.

Where the defendant is the excepting party, and the plaintiff fails to appear in the Supreme court, the court will not treat the plaintiff as having become non-suit, but will hear the defendant *ex parte* upon his exceptions.

BOOK ACCOUNT. The facts of this case sufficiently appear from the opinion of the court.

The defendant excepted to the judgment of the county court.

H. N. Hix and *C. N. Davenport*, for the defendant.

No appearance for the plaintiff.

KELLOGG, J. This was an action on book account, and the questions made on the defendant's exceptions relate to the

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allowance by the auditor of item No. 9 of the plaintiff's account, and the disallowance of a portion of items numbered 20 and 21 of the defendant's account.

Item No. 9 of the plaintiff's account was for damage done by the cattle of the defendant to a field of oats belonging to the plaintiff, which was charged by the plaintiff and allowed by the auditor at the sum of five dollars. The auditor reports that the cattle of the defendant crossed the line fence between lands of the parties, and got into, and destroyed, the plaintiff's oats then growing in his field. The fence was not a lawful or sufficient fence, but was such as the parties supposed would be sufficient to protect their fields, and it was undivided, and it was equally the duty of the plaintiff and defendant to keep it in repair. Sometime in the fall after the damage to the field of oats, the defendant's cattle got into the plaintiff's field again, and did some trifling damage, when the defendant was notified, and, being then reminded by the plaintiff of the damage which the cattle had before done to the oats, he thereupon told the plaintiff that he would allow to him what was right for the oats when they came to settle. The alleged liability of the defendant for this item rests upon this undertaking. Without this undertaking, the utmost that could be claimed by the plaintiff in respect to the damage to his oats by the defendant's cattle was that the defendant was a *tort feasor*, and, as such, liable in an action of trespass; and it might with good reason be said that the damage happened as much in consequence of the fault of the plaintiff as of the defendant, each being under a common and equal obligation to maintain the division fence so that it should be lawful and sufficient. The plaintiff certainly could not have maintained *assumpsit*, if he could have maintained any other action, for this damage; and, to warrant a recovery for it on book, there must have been what would amount to the consent of both parties that it should be considered as matter resting in contract, and to be adjusted on the settlement of their book account as a part thereof; *Stearns v. Dillingham*, 22 Vt. 624. We do not think that there is enough found by the auditor to convert the plaintiff's claim into a matter of contract. No sum was mentioned as the amount of the damage to be allowed, and nothing

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appears in the auditor's report to show that the defendant expected that he was changing the form of any liability which he was under to the plaintiff on account of this damage,—and much less to show that he contemplated a change of his liability from the form of tort into that of an item on book account. We think that the defendant's declaration to the plaintiff that he would allow him what was right for the oats when they came to settle should be interpreted only as an admission of some liability on that account, and not as expressive of a consent to a change in the form of that liability. The allowance of this item, as an item in the plaintiff's book account was, in our opinion, erroneous, and the amount of the same should be deducted from the balance reported by the auditor as due to the plaintiff.

Items numbered 20 and 21 of the defendant's account were for money paid by him to the plaintiff's minor son, David, for David's work charged in item No. 7 of the plaintiff's account, which was performed by David under a contract made by the defendant with the plaintiff. There was no controversy as to the amount of the charge. The plaintiff told the defendant, while David was at work for him, that he (the plaintiff,) should let David have half of his wages, but he never gave to the defendant any express authority to pay David's wages to him. The auditor reports that the defendant paid to David the sum of \$3 25 as charged in said items numbered 20 and 21,—of which sum the auditor allowed to the defendant \$2.42, the same being one-half of the amount of David's wages as charged in item No. 7 of the plaintiff's account, and disallowed the remainder, amounting to 83 cents. The auditor having reported that the defendant had no express authority from the plaintiff to pay to David the amount of his wages, the defendant now claims that such an authority should be implied upon the facts reported as above stated. No exceptions were taken by the plaintiff to the allowance to the defendant of so much of the payments made by the defendant to David as was equal to one half of David's wages while in the service of the defendant; and the auditor, in disallowing the remainder of the payments made by the defen-

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dant to David, must have found that the plaintiff did not receive any benefit from the payments so disallowed. The contract for the labor of David having been made by the defendant with the plaintiff, and no express authority having been given by the plaintiff to the defendant to pay any thing to David on account of the wages of that labor, the plaintiff's right to those wages would seem clear; and the defendant must show an implied authority arising from the course of dealing between the parties to warrant the allowance which he now claims. The facts reported do not, as we think, warrant the conclusion that David had any implied authority from the plaintiff to receive more than one-half of the wages of his labor for the defendant; and we think that, beyond that limit, the defendant had no implied authority to make any payment to David.

The judgment of the county court for the plaintiff is reversed, and, on motion of the defendant, the case is remanded to that court to render judgment in favor of the plaintiff for the balance reported by the auditor as due to him, deducting therefrom the amount allowed by the auditor on item No. 9 of the plaintiff's account, and also for the taxation and allowance of costs. The defendant to be allowed his costs in this court.

NOTE, by KELLOGG, J. In this case, there was no appearance in this court by or for the plaintiff; but, the defendant being the excepting party, the court decided, as a matter of practice, that the plaintiff should not be treated as having become non-suit, and that the case should be heard on the defendant's exceptions. The case was then argued by Messrs. H. N. Hix and C. N. Davenport for the defendant *ex parte*.

Eddy v. Davis.

LEWIS S. EDDY v. SILAS DAVIS.

Replevin. Goods.

In the first clause of section 14, chapter 33, Comp. Stat., (Gen. Stat. p. 320, sec. 13,) providing that the action of replevin may be maintained for goods unlawfully taken or detained from the owner thereof, the term "goods" includes both animate and inanimate movable property.

REPLEVIN for seven cattle belonging to the plaintiff, and alleged to have been unlawfully taken and detained by the defendant. Plea, the general issue, and trial by jury at the September Term, 1861, BARRETT, J., presiding.

The defendant requested the court to charge the jury that the action could not be maintained, it being conceded by the plaintiff that the cattle in question had not been taken by virtue of any attachment or execution, and that if the action could be maintained at all, it could be only under the first clause of the 14th section of chapter 33 of the Compiled Statutes, relating to replevin.

The court declined to charge as requested, to which the defendant excepted.

A. Stoddard and Butler & Wheeler, for the defendants.

C. B. Eddy and H. E. Stoughton, for the plaintiff.

KELLOGG, J. This is an action of replevin for seven cattle, of which the plaintiff claimed to be the owner, and which, as he alleges, were taken and unlawfully detained from him by the defendant.

It has been settled that the action of replevin can not be maintained in this state as an adversary suit at common law, and is to be supported only in the cases in which it is authorized by statute; *Bulkly et al. v. Smith et al.*, Brayton 38; *Taggart v. Hart*, *ib.* 215; *Glover v. Chase*, 27 Vt. 533; *Bennett et al. v. Allen*, 30 Vt. 684. The right of the plaintiff to maintain this action accordingly depends upon the provisions of the statute of replevin; (Comp. Stat. chap. 33, p. 267, *et seq.*) The 14th

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section of the chapter referred to provides that "when any *goods* of the value of more than twenty dollars, shall be unlawfully taken, or unlawfully detained, from the owner or the person entitled to the possession thereof, or when any *goods* or *chattels*, of that value, which are attached on mesne process, or taken in execution, are claimed by any person other than the defendant in the suit, or debtor in the execution, on which they are so taken or attached, such owner or other person may cause them to be replevied," etc. It is conceded that if this action can not be supported as coming within the first clause of this section, it must fail; as it clearly does not come within any of the other provisions of the statute allowing the action of replevin. The defendant insists that the term *goods*, as used in this section, is applicable only to inanimate property, and can not be applied to such property as the cattle described in the plaintiff's declaration; that while the term *chattels* includes in its signification both animate and inanimate property, the term *goods* is limited, and refers only to inanimate movables; and that as cattle are *chattels*, and not *goods*, according to the recognized use and signification of these terms, the plaintiff's action in this case can not be maintained. In general use, the term *goods* is commonly applied to inanimate movables, but its full signification, especially in its legal sense, has a larger or more extensive application. Webster, an approved lexicographer, defines the term as signifying "movables, household furniture, personal or movable estate, as *horses, cattle, utensils*," etc. The primary meaning of the term refers to movable property, whether animate or inanimate. *Biens, bona*, says Sir EDWARD COKE, are words which include all chattels, as well real as personal; Co. Litt. 118, b. In this sense, the word *goods* is used in the ancient and well known form of the solemnization of matrimony, contained in the book of Common Prayer: * * * "with all my worldly *goods* I thee endow," etc. This larger sense of the term has always been adopted in the construction of wills, whenever necessary to carry into effect the intent of the testator; and the same rule of construction should be applied to a statute as to a will, whenever necessary to carry into effect the apparent intention of the legislature. The same extended meaning has been

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given to the term when it is used in pleading, as in the common counts in assumpsit and debt for *goods* sold and delivered, and also in the statute of frauds, and in the statute relating to the trustee process, and in other statutes, (Comp. Stat. p. 234, sec. 36; p. 256, sec. 2; p. 889, sec. 2.) It is, as we think, very apparent, on an examination of the provisions of the replevin act, that the term *goods* is used in it in this broad and extended sense, and not by way of contrast to the substantive meaning of the word *chattels*. But it is claimed that, as this word *chattels* is contained in the second clause of the fourteenth section of the replevin act, as above quoted, its omission from the first clause must be regarded as intentional. Even if this omission was intentional, it would not change the legal sense or signification of the term *goods*, and consequently would not be decisive of the point in controversy; but we think that this omission was accidental rather than intentional, and this view of the matter is supported by the fact that the act by which the jurisdiction of justices in the action of replevin was enlarged, (Acts of 1853, No. 8,) gives to justices, in express terms, the jurisdiction "of all actions of replevin for any goods or *chattels* unlawfully taken or unlawfully detained, when the value of such goods or *chattels* does not exceed twenty dollars." There is, in our judgment, no satisfactory reason for limiting the meaning of the term *goods* as used in the first clause of the fourteenth section of the replevin act; and, in the practical construction of this clause, it has always been treated as applying as well to animate as to inanimate movable property. This construction of the statute is distinctly recognized in *Mellen v. Moody*, 23 Vt. 674; *Briggs v. Oaks*, 26 Vt. 138; *Briggs v. Gleason*, 29 Vt. 79.

The judgment of the county court in favor of the plaintiff is affirmed.

Babcock v. School District.

JOHN W. BABCOCK v. SCHOOL DISTRICT NO. 9, IN GUILFORD.

[TWO SUITS.]

Arbitration and Award. Discontinuance. Practice.

The submission of the subject matter of a pending suit to arbitrators, and an award made pursuant to the submission, is a discontinuance of the action, and the failure of a party to plead the award in bar at the term following its publication, and his consent to a reference of the cause to be decided according to law, will not estop him from insisting, after the report of the referee is filed, upon the legal effect of the submission and award as a discontinuance.

The facts in these cases are stated in the opinion of the court. The causes were tried by the court on the report of the referee, at the September Term, 1861, BARRETT, J., presiding. The county court rendered judgment for the defendant, to which the plaintiff excepted.

———, for the plaintiff.

George Howe, for the defendant.

KELLOGG, J. The referee finds in these two cases that the subject matter of the suits was by the parties submitted to Isaac Brown and Horace Smith, who on the 24th September, 1859, after a full hearing, made an award in favor of the plaintiff. The submission was by parol. It appears from the docket entries in these cases that the two suits, which were pending in the county court at the time of the making of the award, and had been continued from term to term, were at the September Term, 1860, referred to a referee, "to be tried according to law," and that the rules of reference were duly enlarged at the April Term, 1861. The trial before the referee was in August, 1861.

It is conceded by the plaintiff that the submission of the subject matter of the suits to arbitrators is a discontinuance, (*Riaford et al. v. Nye et al.*, 20 Vt. 132; *ex parte Wright*, 6

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Cowen 399,) but it is claimed that such discontinuance may be waived by the party in whose favor it operates, either by positive agreement or by his conduct in reference to it, and that the defendant did waive the discontinuance of these suits by failing to plead the same in bar at the term next following the making of the award, and by consenting subsequently to the reference. The award gave to the plaintiff a distinct cause of action, in which the subject matter of the suits became merged; and, in the absence of any agreement between the parties that the suits shall be considered as pending for the entry of judgment in the same according to the award, there is nothing to relieve the plaintiff from the effect of the discontinuance. If the suits were legally discontinued, the defendant was not bound to recognize them as pending by pleading in bar; and his omission so to plead the discontinuance in bar ought not to be taken as an admission that the suits were at that stage rightfully pending. We consider the defendant's consent to the reference as a recognition of the suits as pending in court, but we do not regard the defendant as estopped by this act from denying that the suits were rightfully pending, or from making this defence before the referee. It would be going too far to say that the act of resisting the plaintiff's right to judgments in these suits should be treated as having revived a cause of action which had become merged in the arbitration and award.

Judgment of the county court for the defendant affirmed.

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MARTIN BROWN v. CALVIN LAMPHEAR.

[IN CHANCERY.]

Chancery. Relief from Mistake in a Conveyance.

The orator conveyed to the defendant a lot of land on which was a spring from which the orator by means of an aqueduct supplied his own and other premises with water. This aqueduct was of greater value to the orator than the price he received for the land. By the mistake of the orator, who did not intend to part with the right to use the water from the spring, the deed to the defendant contained no reservation of such right. The defendant, at the time he purchased, had no knowledge of the existence of the spring. *Held*, upon a bill in chancery for that purpose, that the orator was entitled either to a conveyance from the defendant of the right to use the aqueduct, or to a reconveyance of the land on repaying to the defendant the price thereof, and that the defendant might elect which of these modes of relief the orator should have.

Where a mistake in a conveyance is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, a court of equity will interfere in its discretion to prevent intolerable injustice.

BILL IN CHANCERY. The bill charged that in March, 1856, the orator sold and conveyed to Amos A. Brown, a ten acre pasture in Whitingham, for \$120, in which pasture was a spring, which supplied the house owned and occupied by the orator, and also several other houses owned and rented by him, with water; that in the bargain with Amos Brown and in the deed to him, the orator reserved the use of the spring and the right to bring water from it to supply his various houses, by pipes, aqueduct, &c.; that Amos Brown went into possession of the pasture, but neglected to put his deed on record; that the defendant afterwards applied to Amos Brown to buy this pasture, who refused to sell it, unless the orator would sell to him a certain other pasture; that the orator, on being applied to, at first declined to sell the second pasture, but the defendant being very urgent, he finally consented to sell the second pasture to Amos Brown, so that the defendant might be gratified in his desire to obtain

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the first pasture of Amos Brown ; that during these negotiations Amos Brown told the defendant that he did not own the spring, and that if he sold the pasture the use of the spring must be reserved to the orator, and explained fully to the defendant what right and use the orator had of the spring ; that after the bargain was made, it was agreed between the orator, the defendant and Amos Brown, that inasmuch as the deed from the orator to Amos Brown had not been recorded, that deed should be given up and cancelled, and that the orator should give a deed to the defendant, with all the reservations therein as to the use of the spring and the right to lay pipes, &c., which were in the deed of the orator to Amos Brown, and that the orator should also deed the second pasture to Amos Brown ; that accordingly the deeds were executed by the orator to the defendant and to Amos Brown of the respective pastures, but by the mistake of the scrivener, the reservations about the spring were not put into the deed to the defendant, which the orator signed and delivered without reading it and without noticing the omission, having full confidence in the scrivener and the defendant, and supposing that the deed was drawn up according to the bargain and understanding between them ; that for several years after the defendant took possession under his deed, the orator enjoyed the use of the water as he had theretofore done, without hindrance from the defendant, during which time he did not know, having had no occasion to examine, that the mistake had been made in the deed in omitting the reservation of the spring, &c.; that in June, 1858, the defendant for the first time interfered in the orator's enjoyment of the spring, and cut off the pipes, and prevented the water from running to any of the orator's houses ; that the orator then remonstrated with the defendant, and reminded him of the bargain that he (the orator) should have the free use of the spring, and the defendant thereupon admitted the bargain to have been as the orator claimed, and that he (the defendant) had acted wrongfully in interrupting the orator's use of the spring ; that the orator, relying upon such admission of the defendant, entered the pasture and repaired his water works, for which the defendant has sued him in trespass, which suit was then pending.

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The prayer of the bill was that the defendant be enjoined from prosecuting the action of trespass, and that he be decreed to convey by deed the spring to the orator according to the terms of the bargain, and for further relief, &c.

The answer of the defendant set forth in substance that in September, 1855, he bought of the orator a house in the village of Jacksonville, in Whitingham, previous to which purchase he had resided for several years in the state of New York, and had never lived in Whitingham; that during the negotiations about the house, the orator offered to sell to him the ten acre pasture situated near the house, but the defendant declined at that time to trade for the pasture; that the defendant then went to New York, to remove his family to Whitingham, and on his return in November, 1855, he inquired of the orator if he then wanted to sell the pasture to him, and the orator replied that Amos A. Brown was going to have it, upon which the defendant gave up all thoughts of buying that pasture, and during the winter of 1855-6, had several conversations with the orator about buying another pasture, but made no trade; that in April, 1856, Amos Brown offered to sell him the first named pasture, and told him that he had got the orator's best terms for the second pasture, and should buy it, if he could sell the first pasture to the defendant, and the defendant accepted Amos Brown's offer; that on the same day, the defendant was in the orator's store, who inquired if he was going to buy the first named pasture, and the defendant informed him that he had concluded to take up with Amos Brown's offer, and the orator then said, that he, (the orator,) would give him a deed of it; that from previous conversations with the orator and Amos Brown, he had supposed that the orator had deeded that pasture to Amos Brown, but he was then informed by one, or both of them, that no deed had been given by the orator to Amos Brown, and it was then agreed by the three that the orator should give a deed of the pasture to the defendant; that on the next day, April 18th, 1856, the orator tendered to the defendant a warranty deed of the pasture, with the usual covenants executed by the orator.

The defendant denied in his answer that he had any knowledge,

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information or belief, at the time he accepted the deed, that there was any valuable spring of water on the pasture, or that the orator's houses were supplied with water from that pasture, but he admitted that the orator's houses were in truth supplied from springs in his (the defendant's) pasture, although he never discovered the fact until several weeks after he had received his deed. The defendant denied that any thing was ever said by himself, Amos Brown, or the orator, before the deed was delivered to him, about any spring of water, or about any reservation of any spring of water, but insisted that he always intended, and expected, if he bought the pasture, to have a warranty deed, in common form, with no reservations of any kind in it, and that he should have accepted no other kind of a deed. The defendant positively denied that there was any mistake in writing the deed, and insisted that the deed as written, embodied fully and perfectly the bargain and understanding of the parties to it, and of Amos Brown. The defendant denied that he had any knowledge or belief that the orator intended to reserve the spring, or any rights therein, and says that the first knowledge which he ever had that the orator claimed that he had such intention, or claimed that there was any mistake in the deed, was by service upon him of the bill in this case. The defendant denied that Amos Brown ever told him before the deed was given that the spring did not belong to him, but was reserved to the orator—and insisted that he never had any talk with Amos Brown about the spring any way, till after he had taken his deed.

The defendant stated in his answer that he went into possession of the pasture immediately after taking his deed, April 19th, 1856, and that having occasion to use the water of the spring, he did interrupt the orator's use of it, and that the orator having trespassed upon his land, he had sued him, and insisted that in all this he had acted right.

The answer was traversed, and testimony taken, the purport of which is stated in the opinion of the court.

The chancellor, *pro forma*, dismissed the bill with costs to the defendant, from which decree the orator appealed.

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H. Kirkland and *P. T. Washburn*, for the orator.

C. N. Davenport and *A. Keyes*, for the defendant.

KELLOGG, J. The complainant conveyed to the defendant by a deed bearing date on the 18th April, 1856, a parcel of land, situated near the village of Jacksonville, in the town of Whittingham, and containing about ten acres. The deed was a deed of warranty in the usual form, and did not contain any reservations or exceptions. The complainant by his bill now seeks to have that deed reformed on the ground of an alleged mistake in omitting to insert in it a reservation of a certain spring of water situated on the land conveyed, with the right to take water therefrom by means of a pipe or aqueduct, which was agreed upon by the parties when the contract for the sale of the premises was made, and alleges that this mistake was attributable to the negligence or other fault of the scrivener who wrote the deed.

It appears that at the time of the execution of this deed, the spring, which is the subject of this controversy, supplied with water by means of a pipe or aqueduct leading from it, four dwelling houses belonging to the orator, including the one in which he resided, and two dwelling houses belonging to other persons, which he had agreed so to supply, and that these dwelling houses were dependent upon this spring and aqueduct for the water necessary for household purposes. This aqueduct had previously been constructed by the plaintiff at an expense of about two hundred dollars. In the fall of 1855, he sold the lot of land, on which this spring was situated, to his cousin, Amos A. Brown, with a reservation of the spring, the aqueduct or pipe, and the right to repair the same. In the spring of the following year, there was a negotiation between Amos A. Brown and the defendant, who, during the intervening winter, had resided in the same village, for the purchase by the defendant of this lot of land, the result of which was that the defendant agreed to purchase it for the price which Amos A. Brown had given for it, which was one hundred and twenty dollars, or at the rate of twelve dollars per acre. We think that the testimony

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satisfactorily shows that the plaintiff had executed a deed to his cousin Amos Brown, conveying the lot to him with the reservation agreed upon in their bargain, but this deed was not put upon record, and appears to have remained in the custody of the complainant. When the defendant agreed to purchase the lot, it was agreed by him and Amos A. Brown and the complainant, that the complainant should convey the lot directly to the defendant, it being understood or implied that the deed which he had executed to his cousin Amos A. Brown should be cancelled and destroyed. The plaintiff thereupon wrote the deed from himself to the complainant, bearing date the 18th April, 1856, and duly executed and acknowledged it, and delivered it to the defendant, who then paid to Amos A. Brown the sum agreed upon for the piece of land. This deed conveys the entire estate in this lot, without any reservation of the spring, or of any privilege connected therewith. Nothing was said at the time of the execution of this deed in respect to the spring or the aqueduct privilege, but it cannot be doubted, in view of the testimony, as we think, that neither the complainant, nor his cousin Amos Brown, intended a conveyance to the defendant of any other or greater estate or interest in the lot than that which the complainant had previously sold and conveyed to Amos Brown. The complainant, after the execution of his deed to the defendant, continued for more than two years in as full, free, and undisturbed use and enjoyment of the spring and aqueduct as he had been in prior to the execution of the deed; but, at some time in May, 1858, the defendant asserted an absolute and exclusive right in himself to the spring, and interrupted and obstructed the complainant in the enjoyment of the aqueduct, and the respective rights of the parties to the spring, as affected by the complainant's deed to the defendant, then became a subject of controversy and litigation between them.

We think that it is perfectly clear that the complainant never intended to sell this spring to the defendant, and did not suppose that the deed which he executed would have the effect to convey it to the defendant, or to interfere with his aqueduct, by which the water was conveyed from it. The value of this spring to the complainant, arising from its convenience and essential

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necessity for the use of his own dwelling and the dwellings of his tenants, and the large outlay which he had made in the construction of his aqueduct, which greatly exceeded the price for which he sold the land, is in our judgment conclusive proof that he never intended to part with the privilege which he enjoyed by means of the aqueduct. The defendant in his answer denies that he had any knowledge of the existence of the spring at the time he received his deed from the complainant, and it could not, in that case, have been considered by him as enhancing or in any wise affecting the consideration or price which he paid for the land. The defendant in his testimony, (answer to 43rd interrogatory,) in speaking of a conversation with the complainant at his store, after this controversy arose between them, says "he (the complainant) asked me if I supposed that he meant to sell me that spring when he sold me the land. I told him no, for I didn't think he thought any thing about it. I supposed he forgot it." And the first knowledge which the defendant admits that he had of the existence of this spring is stated by him in his testimony, (answer to 38rd interrogatory,) to have been obtained "perhaps a couple of weeks" after he received the deed. In the same answer, after stating that he looked all over the Farnham hill lot to find the spring which supplied the plaintiff's house with water, and could not find it, and gave up the search, he says:—"After that, I made inquiry where that water run from, and found to my great astonishment that the water run from land that I bought of Martin Brown." The complainant is proved in repeated instances to have declared that he never intended to reserve the spring when he executed his deed to the defendant,—that he would not reserve it if he was going to convey the land again,—and that if he was going to make forty deeds he would not have the reservation of the spring in them; but these declarations were in every instance accompanied with a denial that he sold or conveyed to the defendant any right to the spring, and appear to have been elicited by sympathizing neighbors, who sought amusement or enjoyment by discussions with the plaintiff in respect to the legal effect of his deed—a subject upon which his sensibilities seem to have been very easily excited—and we do not consider that these idle and

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foolish speeches, when thus interpreted, are inconsistent with the rights which the complainant asserts by his bill.

The testimony in the case is voluminous, and upon several of the issues is quite contradictory. We have not had entire unanimity of opinion in respect to the facts established by the testimony on all of the issues which arise in the case, but we are agreed in considering the complainant entitled substantially to the relief which he seeks by his bill. We concur in the opinion that the sale of this spring and aqueduct privilege was not in the contemplation of the parties in their bargain, and that the omission to reserve the spring and privilege in the conveyance was a plain and clear mistake on the part of the grantor. The conveyance transfers to the grantee a value which he did not suppose that he was purchasing,—which the grantor did not intend to sell, and the grantee did not expect to buy,—and which the grantee, as he himself says, did not then know as existing in the premises. It is said by our late honored associate, Chief Justice REDFIELD, in his recent edition of Story's Equity Jurisprudence, (Vol. 1, § 138, i,) that where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice. In *Calverly v. Williams*, 1 Ves. 310. Lord Chancellor THURLOW says that there is no doubt that if one party thought he had purchased a piece of land as a parcel of an estate, *bona fide*, and the other party thought he had not sold, that is a ground to set aside a contract, that neither party may be damaged; because it is impossible to say that one shall give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. The defendant takes by the conveyance a value which he did not purchase, and the case presents such elements of mistake and surprise as afford a solid ground for relief. In respect to the form of this

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relief, we think that as this mistake arose from the act or neglect of the complainant, the defendant should have the option to receive back his money and re-convey the premises to the complainant, or to re-convey to the complainant the right to the use of the water of the spring by means of the aqueduct, as fully and amply as he enjoyed the same for himself and his tenants when he conveyed the premises to the defendant, together with the right to enter upon the premises whenever it may be reasonable and necessary for the examination, repair, or removal of the aqueduct.

The judgment of this court, therefore, is, that the decree of the chancellor by which the complainant's bill of complaint was dismissed *pro forma* with costs, be reversed, and that the cause be remitted to the court of chancery, with directions to enter a decree therein in favor of the complainant, on the following basis, viz:—The defendant to re-convey to the complainant, by a quit-claim deed, within a reasonable time, to be limited for that purpose, the right freely to draw and use the water from the spring situated on the premises conveyed by the complainant to the defendant by the deed mentioned and referred to in the complainant's bill, by means of an aqueduct running from the same, as existing at the time of the execution and delivery of the said last mentioned deed, for the use of the dwelling houses described in the complainant's bill, together with the right to enter upon and use the premises for the reasonable and necessary examination, repair, or removal of the aqueduct,—and no costs in that case are to be allowed to either party; or, if the defendant, within a reasonable time, to be fixed and limited for that purpose, shall elect to re-convey the premises to the complainant, on the repayment by the complainant to the defendant of the amount paid by the defendant as the consideration for the said deed, the same being one hundred and twenty dollars, then the defendant to have the option so to do, and, in such case, the complainant to be decreed to deposit the said sum with the clerk of the court of chancery for the use of the defendant, and to be paid over to the defendant on the execution and delivery of such re-conveyance,—the time for making such deposit, and for executing and delivering such conveyance to re-convey the premises,

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to be appointed and limited by the decree,—and, on the failure of the complainant to make such deposit within the time so to be limited and appointed for that purpose, the complainant's bill of complaint to be dismissed with costs to the defendant. The injunction heretofore allowed in this case to continue in force ; and, on the failure of the defendant to make such election, to be made perpetual.

THE STATE OF VERMONT v. CHARLES WHEELER.

Criminal Law. Indictment. Variance. Passing Counterfeit Money. Supreme Court.

In an indictment for passing a counterfeit bank bill, in setting out the *tenor* of the bill it was described as signed by *J. M. Thompson*. The bill offered in evidence was signed by *J. M. Thompson*. *Held*, that the two names were substantially *idem sonans*, and that there was no fatal variance.

The counterfeit bill offered in evidence contained the word "*three*" six times on the margin at the top of the bill, and also close upon the margin the words and figures "*capital stock \$100,000 secured by pledge of \$100,000 Pennsylvania 6 per cent. bonds.*" The indictment made no mention of these words. *Held*, that the words omitted were no part of the bill, and that there was no variance.

The indictment charged the respondent with passing a counterfeit bank bill of the denomination of three dollars, purporting "to have been issued by the Andover Bank, *a banking company incorporated by the legislature of the commonwealth of Massachusetts*, made payable to E. F. or bearer on demand." *Held*, that the portion in italics was not an allegation of the *purport* of the bill, but of the due incorporation of the banking company, by whom the bill purported to have been issued.

In an indictment in four counts, three for passing counterfeit bank bills, and the fourth for having in possession counterfeit bank bills, with intent to pass the same, the county court instructed the jury that there was no evidence to support either the second or fourth count, and that the respondent could not be convicted thereon. The jury returned a general verdict of guilty. *Held*, that this did not warrant the supreme court to set aside the verdict and grant a new trial.

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INDICTMENT. The facts appear sufficiently in the opinion of the court.

C. N. Davenport, for the respondent.

J. D. Bridgman, State's attorney, for the prosecution.

PROK, J. The indictment in this case is for passing, and having in possession, with intent to pass, certain counterfeit bank bills. The second and third counts, as appears by the exceptions, are for one and the same offence; the only difference between the two counts being, that in the second count the bill is described as No. 4887, and in the third count as No. 4587. The bill produced on trial was numbered 4587 (as described in that respect in the third count. The bill described in the fourth count appeared by the proof to be a genuine bill upon a broken bank, and therefore worthless. The court charged the jury that the evidence did not support either the second or fourth count, and directed them to acquit the respondent on those two counts. The questions reserved arise under the first and third counts.

The first count charges the respondent with passing and giving in payment a counterfeit bank bill of the denomination of five dollars, purporting to have been issued by the president, directors, and company of the John Hancock Bank, under the authority of the legislature of the state of Massachusetts, with the name of J. M. Thompson subscribed thereto as president, &c. The count then proceeds to set out the tenor of the bill in words and figures, in the usual form. In the allegation of the purport of the bill the name of J. M. Thompson is correctly stated, but in setting out the tenor of the bill the exceptions show that the respondent's counsel claimed at the trial that in the indictment the word "Thompson" was written by inserting therein the letter "n" or the letter "u," instead of the letter "m." This, the respondent's counsel claimed, constituted a fatal variance between the indictment and the evidence, and objected to the bill as evidence. The court admitted the bill in evidence.

This, the respondent's counsel claims, is error. On inspection of

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the original indictment we are satisfied that the letter *m* is left out, and the letter *n* inserted in that name. The bill is also referred to, and from that it is clear that the name upon the bill is *Thompson*.

It is necessary in an indictment of this character to set forth the bill or instrument correctly, both in the purport and in the tenor. Where the pleader professes to set out the instrument according to its tenor, he is bound to a strict recital. In relation to significant words, a variation of a letter is not necessarily fatal, if the sense and meaning is preserved, even if it varies the sound. The court in such case have three things by which to determine the legal identity, the *letters or spelling*, the *sound*, and the *sense or meaning*, and if the two former are departed from, still the latter is left by which to determine the legal identity. But names are arbitrary, having no such signification or meaning, but only the spelling and sound to identify them, and if both these are departed from by the pleader, the legal identity is gone, as there is nothing left by which to determine it. Hence the rule in relation to names is more strict, so that if, by the change of a letter the sound of the word is substantially changed, the variance is fatal; that is, to avoid an objection for variance in names, the allegation and proof must be, in technical language, *idem sonans*. There is no doubt as to the rule; the principal difficulty is in its application. In some cases it is clear that the change of a letter so changes the sound that the variance is fatal; while in other cases it is equally clear that it is otherwise. In this case it must be confessed that the sound is very slightly changed, but the change is so extremely slight that it can hardly be detected by the ear on the closest attention. We think there is no such substantial difference in the sound as to constitute a fatal variance. A change of the letter *m* to *n*, in many cases that can be supposed, would so materially alter the sound as to constitute a fatal variance, but in this case the change of those letters, substituting the one for the other, in connection with the letter that follows, produces no such substantial variation of sound as to exclude the instrument as evidence. This exception must be overruled. In *State v. Bean*, 19 Vt. 530, it was held that *Harriman* and *Heremon*, were *idem*

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sonans, and the same in legal effect. In that case the question arose upon an objection to the evidence when the instrument was offered, and the court held that it was properly admitted upon the ground above stated. If that case was put upon the true ground, it is an authority fully sustaining the ruling of the county court on this point in this case. In that case, however, the name was correctly set out in the allegation of the tenor of the instrument, and it was only in the allegation of the *purport* that it was claimed to have been misdescribed. In such case it may be questionable whether an objection to the evidence can properly be taken, and whether the only way to reach the defect in the indictment is not by demurrer or motion in arrest, on the ground that the allegation of the *purport* and of the *tenor* are repugnant. But the court without alluding to this question, treated it as a question of variance, and held that the two names were legally the same.

The next question arises on the admission of evidence under the third count. That count charges the respondent with passing a counterfeit bill of the Andover bank. The bill admitted in evidence was objected on the ground that it contained the word "three" six times on the margin at the top of the bill, and also on the same bill, close upon the margin, the words and figures, "*Capital stock \$100,000, secured by pledge of \$100,000 Pennsylvania 6 per cent. bonds,*" which was not noticed in the description of the bill in the indictment. The court overruled this objection and admitted the bill as evidence. This decision was correct. What was thus omitted constituted no part of the bill, and had no effect to add to or qualify the instrument as set forth, and was no more necessary to be set out than the ornamental part of the bill.

Another objection to both the John Hancock Bank bill and the Andover Bank bill was made by the respondent's counsel, and overruled by the county court, that is, that the indictment in alleging the *purport* of the bills, alleges that they purport to have been issued by banks incorporated by the legislature of Massachusetts, or to have been issued by and under the authority of said legislature, and that no such *purport* appeared on the face of the bills. It is true that the bills have no such *purport*, and it is

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true that if the indictment alleges that the bills purported to have been so issued, it must so appear from the bills, and if it does not so appear, extrinsic evidence can not be resorted to to supply the defect, in proof of that allegation. The only question then is as to the construction of this allegation in the indictment, whether it is to be construed as claimed by the respondent's counsel, as an allegation of the purport of the bill, or as claimed by the counsel for the state, as an allegation, not of the purport of the bill, but an allegation of the fact of the actual existence or incorporation of such bank by or under the authority of legislature. If this were a new question it would not be free from doubt, and in fact it would be difficult perhaps to avoid the construction contended for by the respondent's counsel, since what immediately precedes, and what immediately follows, the allegation in question, confessedly refers to the purport of the bill. But in *State v. Wilkins*, 17 Vt. 151, the question was directly presented on a demurrer to an indictment in substance like the present. The objection taken to the indictment in that case was, that it must, in order to come within the statute, contain an allegation of the fact of the incorporation or existence of the bank by or under the authority of the state, and that as the allegation in reference to the bank was only an allegation of the purport of the bill, and not of the actual existence or incorporation of the bank, the indictment was defective. The court decided that unless the allegation were construed to be an allegation of the existence of an incorporated bank, the indictment would be bad, but held the indictment good on the ground that such was the construction. The court held the indictment good in that case, partly upon the ground that such form had been long in use in this state under the present statute, and a previous statute substantially the same in its provisions. That case must govern this, as there is no material difference between that indictment and this, in that particular. The allegation in question not being an allegation of the purport of the bill, there was no variance in this respect, and this objection was properly overruled.

The remaining objection is, that the verdict of guilty is general, instead of being limited to the first and third counts, when the case shows that there was no legal evidence in support of the

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second and fourth counts. It would, perhaps, have been more proper for the jury to have returned a verdict of guilty on the first and third counts, and not guilty as to the second and fourth counts; at least there should have been a verdict of not guilty on the fourth count, as that is for a distinct offence, not charged in either of the other counts; but however this may be, we see nothing in the alleged error that requires or warrants this court in setting aside the verdict and granting a new trial. There is no error in any decision of the county court, or in any instructions to the jury, or in any omission to instruct them. The county court decided that there was no evidence to support either the second or fourth count, and instructed the jury that the respondent could not be convicted on either of these counts. Upon the whole record the verdict, so far as it affects the respondent, must be taken to be a verdict of guilty only on the first and third counts. It can not be said that the respondent is in danger of a more severe sentence than he would be exposed to if the jury had formally acquitted him on the second and fourth counts, because in passing sentence this court must take general notice that he is not guilty on those two counts, and that he stands convicted only upon the first and third counts. If the respondent could in any way be prejudiced by the verdict being general, this court, on motion, or in some way, would correct the alleged error or informality, as was done in *State v. Roe*, 12 Vt. 98.

Exceptions overruled.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF WINDSOR,

AT THE

FEBRUARY TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. JOHN PIERPOINT,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.
HON. ASAHEL PECK,

Melvin v. Bullard et al.

ABRAHAM MELVIN v. LUTHER BULLARD AND LUTHER P. BULLARD.*Evidence. Practice. Charge of the Court to the Jury.*

Upon the question of the amount of wool certain sheep would yield, and their value, evidence that the sheep compared favorably in those respects with the best flocks of sheep in the country, is too loose and vague to be admissible.

Held, not to be error for a judge in charging the jury, after instructing them correctly upon all the points presented by counsel, to add that it was the fairest and best way for the jury to consider and determine the case mainly upon the grounds which had been taken and discussed by the counsel in the argument.

ASSUMPSIT upon a promissory note. Plea, non-assumpsit and plea in offset, and trial by jury at the December Term, 1861, BARRET, J., presiding. The only controversy in the trial was under the plea in offset, and the questions at issue are sufficiently presented in the opinion of the court. Exceptions by the plaintiff.

A. P. Hunton and Washburn & Marsh, for the plaintiff.

Couverse & French, for the defendants.

PIERPOINT, J. The questions presented by the exceptions in this case, all arose upon the trial of the matters involved in the defendants' plea in offset. By that plea the defendants seek to recover damage which they claim to have sustained in consequence of the plaintiffs selling them a quantity of sheep, with a warranty that said sheep were pure, unmixed Spanish Merino sheep, and would produce a superior quality of wool, and that their fleeces would average seven pounds of wool each. On the issue found upon this plea any evidence tending to prove the truth of the warranty, or the actual value of the sheep sold, in case the warranty was false, would be admissible. And, as bearing upon the questions, the plaintiff offered the deposition of A. M. Clark, a part of which was rejected, and in this it is claimed, on the part of the plaintiff, there was error. That part

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of the deposition that was excluded is as follows: "I have sold sheep which were inferior to those of Mr. Melvin for twenty dollars per head, within the last two years. I tried to purchase some of Mr. Melvin's sheep in the year 1853, and I have tried nearly every year since that time to purchase some of them, and I think I have offered him within the last two years from fifteen to twenty dollars for young ewes. My impression is that I offered him twenty dollars each, for fifty or more of his sheep in 1853, and may have offered him the same since." In determining whether this testimony has any bearing upon the issue, it becomes necessary to look at other parts of the deposition, to see what sheep the witness has reference to, and his means of knowledge as to the value of the sheep in question. The time when the witness saw the plaintiff's sheep in 1853 was about a year before the plaintiff sold to the defendants. He says he never saw the plaintiff's sheep after 1853; that he did not then see all the plaintiff's sheep; that he was not acquainted with the sheep sold to the defendants, and did not know that he had seen the wool from the plaintiff's sheep after that time; and there is no evidence in the case, either from the plaintiff himself, or from any other source, tending to show that the sheep the witness proposed to purchase, or any part of them, were the same sheep that the defendants bought, or that they constituted a part of the same flock, or that the witness ever saw any of the sheep in question, or the flock to which they belonged. Conceding, then, for the purposes of this question, that the fact that the witness made an offer for some of the plaintiff's sheep in 1853, is evidence tending to show the value of the sheep he proposed to buy, it is quite clear, under the circumstances of this case, that the fact that he made such an offer, or any evidence he might give of the value of the sheep he wanted to buy, is not admissible as having any tendency to prove the value of the sheep in question, which he did not see, and of which he had no knowledge. The value of the sheep the witness attempted to purchase, however well established, would give no aid to the jury, or furnish any criterion upon which they could act, in determining the value of the sheep the plaintiff sold to the defendant.

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Again it is insisted that the county court erred in excluding parts of the depositions of Morse and Couch. The evidence excluded tends to show that the plaintiff's flock of sheep compares favorably with the best flocks of sheep in the country, in respect to the amount of wool it produces, according to the number of sheep. This evidence was offered as bearing upon the amount of wool that the sheep in question would produce, and as affecting their value. Such evidence we think is too loose and indefinite, to be admitted for such purpose. The fact that the plaintiff's flock "compares favorably" with other flocks in this respect does not go to show how much other flocks produce, or how much the plaintiff's flock produced, much less does it tend to show how much the sheep in question would produce. We think, therefore, there was no error in this.

But it is further insisted that the court erred in the manner in which they presented to the jury the point made by the counsel for the plaintiff in their second request. Upon the case, as it is presented, we are inclined to the opinion that the court would have been fully justified in refusing to charge as requested upon this point, on the ground that there was in fact no variance between the contract alleged in the plea, and the one proved, but however that may be, we think the charge is not obnoxious to the objection that is urged against it.

It is undoubtedly true that if the county court in charging the jury according to the request of a party in a point when such party is entitled to a charge according to such request, should charge the jury in such a manner, and accompanied with such remarks, as to neutralize and destroy the effect of the charge, so that although the charge in form is according to the request, and as it ought to be, it is in substance and effect a refusal so to charge, and a denial of the request, and not such as the party is entitled to, it would be error, and this court would for that reason reverse the judgment. In this case it appears that the question referred to, had not been alluded to in the course of the trial, or anything said to the jury or court on the point in the argument, the request having been passed up to the judge, while the argument was progressing, and the attention of the counsel on the other side was not called to it, so that in presenting the

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point to the jury, the court would be aware that it would appear to them as a new point, started by the court, and of which the counsel on neither side had taken any notice. The judge therefore stated to the jury that although nothing had been said on the subject in the argument, yet the counsel had preferred a written request to the court to charge on the point, as they had a right to do, and it was the duty of the court to give the jury proper instructions in regard to it, which the judge proceeded to do, and to the charge in this respect no objection is made. But in connection with it, and in reference to the circumstances under which the question had been presented, the judge told the jury that as a general rule it was the "fairest and best way" for a jury to decide cases mainly upon the grounds taken and discussed by counsel in the argument. This, as a general proposition, is undoubtedly correct, and it was only as a general proposition that it was stated to the jury, and not as one by which they should be governed in this case, for they were expressly told to pass upon the question, and that if they found the facts to be as claimed by the plaintiff, then there would be such a variance between the defendant's plea and his proof as would be fatal. The object of the judge in stating the proposition to the jury seems to have been to prevent them from understanding from the course taken in this case, that it was proper for jurymen to start questions among themselves in the jury room, and decide cases thereon, that had not been alluded to in the course of the trial, a thing that any practitioner knows is frequently done, and that when it is done, the point so raised is almost invariably one that has nothing to do with the case,

Judgment affirmed.

C A S E S

ARGUED AND DETERMINED

IN THE

S U P R E M E C O U R T

OF THE

S T A T E O F V E R M O N T,

FOR THE

C O U N T Y O F O R A N G E,

A T T H E

M A R C H T E R M, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

**HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. JAMES BARRETT,**

} ASSISTANT JUDGES.

Baldwin v. Shaw.

CHARLES C. P. BALDWIN v. JOSEPH W. SHAW.

Officer. Sheriff. Execution. Replevin. Deputy Sheriff.

If, after an officer has levied an execution upon personal property, and advertised it for sale, but before he has sold it, the property be taken out of his hands by replevin, and the officer thereupon returns the execution unsatisfied, stating in his return the facts in relation to the replevin of the property, he is entitled to his fees for travel and for poundage, and may recover the same of the execution creditor in an action of book account.

The fact that, in such case, the levying officer is a sheriff, and that the writ of replevin is served upon him by one of his own deputies, and that such deputy is guilty of official negligence in not returning the replevin writ or bond into court, furnishes no defence, in the nature of failure of consideration, to the sheriff's action for his fees on the levy of the execution. The remedy against the sheriff for his deputy's neglect must be enforced by an action *ex delicto*.

BOOK ACCOUNT. From the auditor's report it appeared that the first item of the plaintiff's account was for serving a writ, as sheriff, in favor of the defendant against one Low. The second item was for time spent at the defendant's request, in trying to settle his suit against Low. No question was made in the supreme court in regard to the propriety of these two items. The third item amounted to \$8.19, and was for official fees as sheriff of Orange county in levying an execution in favor of the defendant against Low.

It appeared that such an execution, dated July 12th, 1856, was placed in the plaintiff's hands, on the 27th of that month, by the defendant's attorney, with directions to levy it on a piano, supposed to belong to Low, and worth about seventy-five dollars. The plaintiff accordingly, on the 18th of August, 1856, levied the execution on the piano, and duly advertised it for sale on the execution, on the 1st of September, 1856, at which time he adjourned the sale till the 6th of September, 1856, on which day the piano was taken from the plaintiff upon a replevin writ, in favor of one Prichard, which replevin writ was served by one Bliss, one of the plaintiff's deputies; and these facts were all duly stated in the plaintiff's return upon the execution, which return also contained the statement that the plaintiff could find no other property to levy upon, and that he therefore returned the

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execution unsatisfied. It further appeared that neither the replevin suit nor the replevin bond was ever entered in, or returned to, court. The defendant claimed before the auditor that the plaintiff was derelict in the matter of the defendant's execution and the sale of the piano thereon, and by reason of the neglect of his deputy Bliss to enter the replevin suit in court, and that therefore the plaintiff ought not to recover any portion of the third item in his account. The auditor reported that if the court should be of opinion that the plaintiff had been in default in the discharge of his official duties, and by reason of the neglect of Bliss to return the replevin writ, the damages thereby resulting to the defendant exceeded the amount of the plaintiff's account.

Upon this report the county court at the January Term, 1861, PECK, J., presiding, rendered judgment for the plaintiff for the amount of the first and second items of his account, and also for \$2.07 of the third item, being \$1.32 for travel fees in returning the execution to the court, and ninety-six cents poundage on the sum of seventy-five dollars, the value of the piano levied upon.

To this judgment the defendant excepted.

C. B. Leslie, for the defendant.

A. M. Dickey, for the plaintiff.

POLAND, CH. J. No question is made upon the facts reported, but that the plaintiff's charges for service of the writ against Low, and for his services in trying to effect a settlement of the defendant's suit against Low, were proper, and ought to be allowed to him.

It is claimed that he improperly adjourned the sale of the piano he had advertised, and that therefore he should not be allowed for his fees on the execution.

The auditor's report does not state, why, or for what reason, the sale was adjourned, and we can not; therefore, assume that it was wrongful, or that the defendant thereby suffered any damage. The ordinary presumption which the law makes in favor of the acts of all men, and especially all acting in an official character, applies.

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The property advertised by the plaintiff was taken out of his hands by another officer on a writ of replevin. It has already been decided by this court, (*Shaw v. Baldwin*, 33 Vt. 447,) that although that officer was the plaintiff's deputy, and therefore the service defective, so that it might have been pleaded in abatement of that process, still that it was not wholly void, so that the plaintiff was justified in surrendering the property, and not liable for not proceeding to sell it upon the execution. But the defendant claims that the plaintiff, as he did not proceed to sell the property, but returned the execution, stating what he had done under it, and how the property had been taken away from him, is not entitled to charge any fees thereon; that it is really the same as if he had made a *nulla bona* return on the execution.

Our statute formerly provided that a sheriff or constable should be entitled to no fees for returning an execution *non est*, but I am unable to find that any such provision is now contained in our statute. It may be that without such provision a sheriff would not be entitled to any fees for such return, on the ground that really he had made no service of the precept, but it is not necessary to decide that point. In the present case the plaintiff had proceeded to levy the execution on property, posted it for sale, and once adjourned the sale, when the property was taken away from him by another officer. We think he was as much entitled to fees on the execution, as if the defendant himself had interfered, and countermanded the sale.

The defendant also claims that the plaintiff was not entitled to the poundage or commission given by the statute, because he made no sale of the property, and that this fee must always be taken out of the avails of property sold by the officer, and is never chargeable to the creditor. But this fee is given for *levying the execution*, which was done in this case. Generally of course this is followed by sale, but if, for any reason, for which the officer is not in fault, the sale is prevented, we think the officer does not lose his fees. So where property is sold on an execution, the officer generally deducts from the proceeds of the sale all his fees, and only applies the net proceeds on the execution, but if the creditor employs him to do

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the service, and he is prevented from getting his pay from the proceeds of sales on the execution, by no fault of his own, the creditor must pay him. The plaintiff's account then, so far as the same was allowed by the county court, was justly due from the defendant.

But the defendant says, that Bliss, the plaintiff's deputy, was guilty of an official default, in not returning the writ and bond of replevin, and that he suffered loss thereby to a greater amount than the amount of the plaintiff's account against him, and that, as the law makes the plaintiff legally answerable for all his deputy's official defaults, this furnishes a defence to this action. The defendant's counsel claim that this is equivalent to proving that the plaintiff's services, which form his account, were really of no value to him, and therefore do not entitle the plaintiff to receive payment.

The authorities produced by the defendant, to show that where services are so improperly and unskillfully performed as to be of no value whatever to the party receiving them, no recovery will be allowed, are unquestionable. The difficulty is, that this is a totally different case. The plaintiff's services were all properly performed, and he was guilty of no neglect or unskillfulness that formed any ground to deprive him of payment. The plaintiff may be liable, as the defendant claims, for his deputy's default, in an independent matter, disconnected wholly with the plaintiff's services. The defendant's claim, and the plaintiff's liability, do not rest at all in contract, and an action to enforce it must be in form an action *ex delicto*. It probably could not have been even pleaded in offset to the plaintiff's debt, and much less can it be set up generally as a failure of consideration. If it be all the defendant claims for it, it is a mere counter claim, sounding in tort.

The judgment is affirmed.

Bradley v. Chamberlin et als.

JOHN BRADLEY v. JOHN E. CHAMBERLIN, JAMES M. CHADWICK
AND MOSES R. CHAMBERLIN. .

Scire Facias upon Sheriff's official recognizance. Judgment.

In *scire facias* upon a sheriff's official recognizance, the previous judgment against the sheriff is conclusive of the plaintiff's right to a judgment against the sheriff and his bail, as against all defences which the sheriff might have urged in opposition to the suit against him alone, except when the judgment was rendered against the sheriff by default.

SCIRE FACIAS upon an official recognizance entered into by the defendant, John E. Chamberlin, as sheriff of Orange county, and by the other defendants as his bail, for the faithful performance by John E. Chamberlin of his duties as such sheriff.

The declaration set forth that the plaintiff delivered an execution in his favor against one Tarbell, to one Godfrey, a deputy sheriff under the said John E. Chamberlin, for collection; that Godfrey collected such execution, but neglected to pay the money to the plaintiff; that the plaintiff thereupon brought an action against John E. Chamberlin, for such neglect of his deputy Godfrey, of which action John E. Chamberlin was duly notified, and that the plaintiff recovered judgment therein against him, and that the plaintiff had taken out execution on such judgment against John E. Chamberlin, which had been returned unsatisfied.

The defendant, Moses R. Chamberlin, filed a separate plea, setting forth that the plaintiff's attorney, at the time of the delivery of the execution against Tarbell to Godfrey, directed him, in case he (Godfrey) should be served with a trustee process, as the trustee of the plaintiff, after he should have collected the execution of Tarbell, to deposit the money in the South Royalton Bank; that Godfrey was so trusted, and that he deposited the money so collected of Tarbell in such bank, as directed, and that in consequence of the insolvency of the bank the money so deposited had not yet been paid to the said Godfrey.

To this plea the plaintiff demurred.

The county court, at the January Term, 1862, PECK, J.,

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presiding, *pro forma* adjudged the plea sufficient, and rendered judgment for the plaintiff, to which the defendant Moses R. Chamberlin excepted.

L. B. Peck, P. T. Washburn and O. B. Leslie, for the defendant.

C. W. Clarke, for the plaintiff.

PIERPOINT, J. This is a *scire facias* brought upon a recognizance entered into by John E. Chamberlin, as principal, and the other defendant as sureties, to secure the faithful performance by the said John E. Chamberlin of the duties of sheriff of Orange county.

The questions arise upon a demurrer to the separate plea of Moses R. Chamberlin, one of the sureties in the recognizance.

The plea alleges, as a defence to these proceedings, facts which, if proved, might have constituted a good defence to the principal, in the suit brought by this plaintiff against him as sheriff, to recover the damage which the plaintiff sustained in consequence of the neglect and unfaithfulness of the sheriff in the discharge of the duties of his office ; and the question upon this part of the plea is whether it is *competent* for the surety to set up such matter in defence of this proceeding. or, in other words, whether he is concluded in regard to such matters by the judgment in that case against the principal. That the principal is concluded by that judgment is conceded. Its effect upon the sureties in this proceeding we think must depend entirely upon the construction that shall be put upon our statute regulating proceedings of this character.

The form and order of proceeding is specifically pointed out by the statute. It provides that the party claiming to have been injured by the official misconduct of the sheriff shall first, and before resorting to the recognizance, establish his claim by obtaining a judgment against the sheriff for his damages, resulting from such misconduct, and show a failure to collect the same of him. It is also provided that on the return of the writ of *scire facias* the court, unless satisfactory cause be shown to the contrary, shall render judgment against such sheriff and his

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sureties in favor of the creditor, for the amount of such judgment and all charges, with interest and cost. It is further provided by the 59th section of chapter 28 of the compiled statutes on this subject, that in all cases where the original judgment against the sheriff was rendered by default, and *scire facias* shall be brought, as before provided, the sureties may make any defence, and take any advantage in the *scire facias* which the principal might by law have made, or taken, in the original action.

We think it is manifest from these several provisions, that it was the intention of the legislature that the judgment against the sheriff should be conclusive of the claimant's right to a judgment against the sheriff and his sureties, in the *scire facias*, as against all defences that the sheriff might have urged in defence of the suit against him alone. The "*satisfactory causes*" referred to in the 57th section are evidently those cases that have arisen since the judgment was rendered against the sheriff; for instance, a payment of such judgment in whole or in part, or such cases as are personal to the sureties, as infancy, or any legal inability to contract such an obligation. If this clause in the 57th section gives to the sureties the right to interpose any species of defence that the principal might have set up in the suit against him, it must have the same effect as to the principal, as it is equally applicable to him as to them, and such an effect is not claimed for it.

If it was not the intention of the legislature to make the judgment against the principal conclusive to the extent before indicated, why require that the claimant should first procure a judgment against the principal? Why not allow this proceeding against the sheriff and his sureties in the first instance, and have the whole controversy done at once, instead of compelling the claimant to contest the matter to the end of the law, as was done in this case with the sheriff, and then leave him to fight the same battle on the same issues, and to the same extent, with the sureties?

Upon any other construction than the one we now adopt, the 59th section becomes wholly inoperative, for if the sureties have the right to set up every species of defence in all cases, why

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give them the right, in cases where the judgment against the sheriff is by default, as they would have the right without this section; but upon our view of the statute there is a manifest propriety in giving the sureties their right in such cases, as the judgment against the sheriff might be obtained by default, without his knowledge; he might be out of the state, and the process served by attaching property, and notice given by publication; or if he so far neglected a defence as to allow judgment to be taken against him by default, that might have been regarded as a sufficient cause for allowing the sureties to come in and defend.

But it is said there is a hardship in concluding the sureties by a judgment against the principal, obtained in a proceeding to which they were not parties. This objection, in proceedings like the present, we think is more potent in theory than in practice, as it is hardly to be supposed that a sheriff would allow a judgment to be obtained against him for such a cause, without availing himself of all legitimate defences that exist, and no person is likely to be as well informed upon the subject as himself, and whatever hardship there may be in such cases, we think is far more than counterbalanced by the hardship that would be otherwise entailed upon the other party, who would be compelled twice to follow through a protracted litigation of the same points, and substantially with the same parties, for it can not be doubted that in both contests the sheriff would be the real party with whom he would have to contend.

This view of the statute, we think, is in harmony with the practice under it for a long period of time, and with the construction that has been put upon it by the profession throughout the state.

Regarding it as we do, it becomes unnecessary to enter into a discussion of the general principle as to the effect of judgments against the principal upon the sureties, a point on which there is much conflict of authority.

The judgment of the county court is affirmed.

Bank of Newbury v. Richards et al.

BANK OF NEWBURY v. S. G. RICHARDS AND DANIEL WEBSTER.

Promissory Note. Action. Principal and Surety.

A note made payable to a bank, and executed for the purpose of raising money, may be taken by any person advancing money upon it, and held by him as a valid instrument against the makers, both principal and sureties, enforceable by suit in the name of the bank.

So far as regards the liability of the sureties, there is no greater legal obligation upon the person taking and holding, in good faith, such note under such circumstances, to have it at the bank, to which it is by its terms payable, at its maturity or a reasonable time thereafter, or to notify the sureties that he holds the note, than rests upon the holders of promissory notes generally.

A promissory note, whether negotiable or not, which does not specify any place of payment in terms, is in general payable wherever the person, lawfully holding it, is.

Beyond the obligation of the holder of a promissory note not to contract with the principal for delay in enforcing payment, for a definite period, on sufficient consideration, the only rule of law prescribing duties to the holder of the note, in reference to sureties, is the general one of good faith and fair dealing.

ASSUMPSIT on a promissory note for six hundred dollars, dated August 15th, 1857, payable to the plaintiffs in ninety days after date, and signed by the defendants, and by one Wyman, who was also named as a defendant in the writ, but as to whom the officer serving the writ made a *non est* return.

The defendant Webster pleaded the general issue, and the cause was tried at the January Term, 1861, PECK, J., presiding.

It appeared that the defendant Richards was the principal upon the note, and Webster and Wyman only sureties; that Richards procured the sureties to sign the note under the expectation on their part that it was to be discounted by the plaintiffs for Richards; that the signers of the note all resided at Charleston, in this state; that Richards carried the note, shortly after its execution, to one Morse, of Haverhill, New Hampshire, who discounted the note for him being aware that the defendants

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Webster and Wyman were only sureties on the note ; that Morse knew where the sureties resided ; that about the time the note became due Webster inquired of Richards whether it was outstanding or paid, and Richards told him it was paid ; that shortly afterwards Webster wrote to the plaintiffs, inquiring if they had such a note, and immediately received reply that they had not ; that shortly afterwards Webster and Wyman caused another similar inquiry to be made of the plaintiffs, and received a reply to the same effect ; that the sureties supposed the note was paid, until about the 15th of January, 1859, when Morse carried the note to the plaintiffs, and obtained the consent of the plaintiffs to aid him in the collection of the note, and that the plaintiffs' cashier at that time, by Morse's request, wrote the defendant, Webster, that they had the note, and requested him to pay it.

It further appeared that Richards continued to reside at Charleston, and was in good credit, and paid his debts until December, 1858, when he absconded, leaving no property behind him ; that from the date of the note up to the time of his absconding, the note might have been collected of him, and that if the sureties on the note had, at any time after its maturity, known it was outstanding, they could and would have caused it to be collected out of Richards, or would have paid it themselves and collected the amount so paid out of Richards.

It also appeared that the present suit was prosecuted by Morse, with the consent of the plaintiffs, but for his (Morse's) sole benefit.

The court also found as a fact that the sureties used due diligence to learn whether the note was paid, and whether it was outstanding, and that the loss to Morse or to the sureties, as the case might be, in consequence of its non-payment by Richards, was occasioned by Morse's neglect to cause the note to be at the bank of Newbury when it fell due, or in any reasonable time thereafter, or to notify the sureties that he held it, or that it was not paid.

Upon all these facts the county court rendered judgment for the defendant Webster, to which the plaintiffs excepted.

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William Hebard and *A. Underwood*, for the plaintiffs.

C. W. Clarke, for the defendant Webster.

BARRETT, J. Under several successive decisions in this state, beginning with the *Bank of Burlington v. Beach*, 1 Aik. 62, and ending with the *Bank of Middlebury v. Bingham et al.*, 33 Vt. 621, in which the decisions of the courts of other states, on the same subject, have been fully considered, it must now be regarded as settled, that Morse could advance the money upon this note, and receive and hold it as a valid instrument against the makers thereof, enforceable by suit in the name of the bank, unless precluded by some act or default on his part, as the holder.

As he did advance the money and take the note therefor, the question is, whether the liability of the sureties has been discharged, by reason of his acts or omissions in respect to the note.

The decision of the county court seems to have been made on the ground, that he did not have the note at the bank at the time it fell due, or in a reasonable time thereafter; nor notify the sureties that he was the owner and holder of the note, so that they might be able to know where it could be found, seasonably to take measures to secure themselves for their liability upon it.

As the case does not show any want of good faith towards the sureties, in the course taken by Morse with the note, the material point rests in the question, whether he has violated, or neglected, any duty which the law imposed on him towards the sureties, whereby they have suffered prejudice.

As to the alleged duty, (as one branch of the alternative above stated,) to have the note in the bank at or soon after the time it became payable:—The note does not specify any place of payment in terms. The ground on which it is claimed that the note should have been in the bank, at or near its maturity, is, that it being payable to the bank, and not made negotiable, the law will hold the place of payment to be at the bank, the same as if it had been so specifically made payable there.

As a general rule, when no place of payment is named, a note,

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payable to an *individual person*, whether negotiable or not, is payable wherever it may be in lawful custody. We know of no principle or decision that would make the rule different in case of a note payable to a *bank*, or any other *corporation*. If this note had been payable to John Doe, or any other individual, there would be no question, that Mr. Morse might have received the note upon a lawful transaction, and held it in the manner that he held this note, and it would have been payable, not at the house or office, or the personal *locus in quo*, of John Doe, but at any place where Morse might be with it, at any time after it fell due. As Morse was, in the case before us, equally in the lawful custody of the note payable to the bank of Newbury, we think it stands upon the same ground, as to place of payment, and therefore, so far as place of payment is concerned, there was no legal necessity for him to have the note at the bank, at the time, and in the manner claimed.

As to the duty to give notice that Morse owned or held the note :—The point in this respect must stand, if at all, upon the ground of a *legal duty*, as before remarked. In reference to parties sustaining certain relations to bills and notes, as drawer, or endorser, or guarantor, the law, for good reasons, has established certain rules, that must be observed, in order to fix liabilities upon such parties. But in reference to sureties, we do not understand that those rules are applicable. A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper. With a very obscure logic, and an obvious departure from the analogies in the common application of established principles in the law, it may be, that, in regard to sureties, there has been established an arbitrary and technical rule, viz.: that if the holder contracts with the principal for delay in enforcing payment, for a definite period, on sufficient consideration, he thereby will discharge the surety from liability, without enquiry whether the surety has been in fact put to any peril of detriment thereby.

But beyond this, we understand that the only rule of law, prescribing duties to the holder of the note, in reference to sureties, is the general one of good faith and fair dealing.

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And when the facts and circumstances of the given case do not charge him with any want of these, the sureties stand on no ground of advantage over the principal, in respect to immunity from liability. The court below have not reported any finding of a want in this respect ; nor do the facts, which are found, constituting the history of the note and of the parties, in their relation to it, betoken any want of such good faith and fair dealing.

Indeed, it seems clearly to be a case, in which both Morse and the sureties had, and had reason to have, entire confidence in Richards, both as to honesty, and as to ability to pay this, and all his other debts. In the absence of any thing found, or indicating that Morse suspected, or had any reason to suspect, any design on the part of Richards to play false with his sureties, or that they were in any peril as such sureties, there is no ground for predicating any want of good faith and fair dealing on the part of Morse towards them.

This being so, we know of no rule or reason, why he might not let the note lie, without notifying, or calling upon, the sureties, for such time as he saw fit. It being settled law that this note might go into the hands of any body else, as well as the bank, as a means of raising money, and be held as a valid and enforceable instrument against the makers thereof, it must be supposed that the sureties signed it in view of the legal consequences, both to the holder and themselves. They signed it reposing full confidence in the principal, as before remarked, both for honesty and ability to pay. Because that confidence was misplaced, and they were misled by the falsehood of Richards, as to having paid and taken up the note, the results thereof can not be visited upon Morse, who was holding the note in lawful right, and neglecting no duty towards them, which either the law or good morals imposed.

The judgment is reversed ; and, as is the practice in cases in which all the facts are found and reported, we proceed in this court to render such judgment as the law requires, judgment is rendered here for the plaintiff to recover the amount due on the note, with costs.

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LOREIDA H. CHAPLIN, LUCIA ANN CHAPLIN, AND LOUISA MARIA CHAPLIN v. EZEKIEL SAWYER, *Administrator of the Estate of MATTHEW CHAPLIN, DECEASED, AND JAMES BUCHANAN, W. G. BUCHANAN, AND H. F. SLACK, creditors of said Estate.*

[IN CHANCERY.]

Homestead. Chancery. Dower.

The act of 1857 (Acts of 1857, No. 28, p. 39) providing for relief in certain cases where the homestead can not be conveniently set out in severalty, applies as well to the homestead left by deceased persons, as to that of persons in life.

It is not requisite to the jurisdiction of the court of chancery under the act of 1857, relating to the homestead, to grant relief to the owners of a homestead left by a deceased person, that the probate court should first adjudge that there is a homestead in such deceased person's estate.

Under the act of 1856 (Acts of 1856, No. 23, p. 24) providing that there should be no homestead right in the estate of a deceased person, the assets of which, over and above all debts due, and charges of administration, shall exceed \$500, the personal property assigned by the probate court to the widow, and the widow's dower, are not to be reckoned among the assets.

Under the laws of this state, relating to the homestead, in force in 1856, both homestead and dower may be set out in the same estate, but the dower is to be reduced by the amount of the widow's interest in the homestead.

PETITION by the widow and minor children of Matthew Chaplin, deceased, for relief, in respect to their homestead interest in certain real estate, in accordance with the provisions of the act of 1857, entitled "an act relating to the homestead," (Acts of 1857, No. 28, p. 39.)

The facts of the case sufficiently appear from the opinion of the court.

A. Underwood, for the orators.

Leslie & Rogers, for the defendant creditors.

ALDIS, J. This is a proceeding under the act of 1857, relating to the homestead. The widow and heirs of Matthew

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Chaplin presented their petition to the court of chancery, stating that they had a homestead interest in a tavern stand, and about twenty acres of land, and the buildings thereon, in Wells River village, of the value of \$2,000; that the homestead could not be set out in severalty without great inconvenience to the parties interested, and praying for relief under the statute. The administrator of the estate was made a defendant. None of the creditors of Matthew Chaplin's estate were joined as defendants; and it does not appear that there were any mortgagees, levying creditors, or other incumbrancers specifically interested in the property, to be joined. The administrator appeared, admitted the facts stated in the petition, and advised a sale of the whole property. The chancellor ordered a sale of the whole, and that the homestead interest in the avails, (being \$500,) be deposited in bank, subject to the order of the court. The estate was sold, the \$500 placed in bank, and the remainder was left in the hands of the administrator. The widow and heirs then prayed the court that the \$500 be paid to them, or invested for their benefit; the administrator assented, and the court ordered the sum to be put into the hands of Judge Underwood, to be lent by him upon good security, upon interest, payable annually, for their benefit, and he to hold the security, subject to the order of the court. The money was loaned by Judge Underwood, according to the order of the court, and it is not claimed but that the security is ample and the loan safe.

About a year after all this had been done, J. & W. G. Buchanan, and others, creditors of the estate of Matthew Chaplin, who appear here as defendants, applied to the probate court for an order that the moneys derived from the sale of the estate, and in the hands of the administrator, be distributed among the creditors. The petition to the probate court did not specifically pray that this sum claimed as homestead should be distributed, but it is admitted that such was the object of the application. Thereupon the widow and heirs applied, by petition, to the chancellor, for an injunction to restrain the creditors from any further proceeding in the probate court, in regard to the homestead. The injunction was granted. The defendant creditors so enjoined filed an answer upon oath to the petition, setting

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forth their grievances, and prayed the chancellor that they might be heard in the premises. The petition of the widow and heirs was entered at the January Term, 1860, and the answer drawn and sworn to at the January Term, 1861, but not filed till recently. No petition has been filed by the creditors for leave to appear and contest the right to the fund. Chancery having jurisdiction of the matter, the injunction might well stand without re-opening and deciding anew the question whether the petitioners were entitled to the fund.

I. The first question raised in the case is upon the motion to dismiss the appeal of the creditors to this court, upon the ground that they have not properly appeared, or been allowed by the chancellor to appear, as parties to the original petition, and as claimants of the fund. The administrator by his counsel denies having taken any appeal.

It was unquestionably within the discretion of the chancellor, and upon a proper case shown it would have been his duty, to allow the creditors, upon petition and notice to the adverse party, to appear and contest the claims made by the widow and heirs in the original petition. Thus, if there was ground to suspect collusion between the petitioners and the administrator, or if in fact no homestead right existed, or the estate was of less value than \$2,000, or other good defence existed, and the administrator refused or neglected to make such defence, the creditors interested might apply to the chancellor and get leave to appear and defend. They did not apply or appear in this case till the injunction issued against them. Then they appeared upon the motion for the injunction, and stated, by way of answer to the motion, the grounds upon which they contested the claim of the widow and heirs to the fund. Upon this no hearing appears to have been had—no order directly made by the chancellor. From the time the creditors appear in the case, their proceedings seem to have been in disregard of all proper practice in chancery, and as this is the first case which has come before us under this statute, we feel it to be our duty to so declare, lest this loose practice might be deemed a precedent for proceedings in some future case. As the chancellor seems to have treated the creditors as being in court to be heard in regard to

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the disposition of the fund, and has ordered the fund to be divided between the widow and heirs, we have concluded to revise the proceedings, as well upon the original petition as upon the matter of the injunction.

I. The first question which the creditors raise is, that the act applies only to the homesteads of persons in life, and that the chancellor has no jurisdiction of cases where the existence and disposition of the homestead of a deceased person are to be acted upon; and that the probate court alone has jurisdiction in such cases.

1. There is nothing in the language of the act to indicate that the homestead of deceased persons were intended to be excepted. The statute by its terms applies to all homesteads.

2. The intent of the act, and the evil to be remedied, require that it should be extended to homesteads belonging to the estates of deceased, as well as living persons.

Where "the dwelling house, buildings and lands appurtenant," which constitute the homestead, are of considerable value, the severance of the homestead, to be occupied by one family, while the rest of the house and land is occupied by another, becomes a matter of much difficulty, and is generally attended with inconvenience to all parties. It is difficult to set out a part of an expensive, or even of a moderately expensive house, so that a five hundred dollar interest in it shall secure to the poor family the comforts which the homestead is intended to provide. To the owner of the rest of the house and lands the homestead becomes a great inconvenience. This evil, which was at once felt when creditors levying executions, or mortgagees entering under foreclosures, sought to take possession, was what the statute sought to remedy. It is obvious that this evil may as well exist, and should as much be remedied, in the case of homesteads accruing in the estates of deceased persons as in others. The course of proceeding in chancery is well adapted to the division, or sale of such estates, and to the distribution, investment, or control of the fund. Hence the statute.

II. The creditors also object that there was no homestead, to be sold or divided, because the assets of the estate exceeded

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\$500 after paying all debts and the charges of administration. Acts of 1856, p. 24.

Upon the evidence, however, we think the assets did not exceed \$500. Taking out the assignment to the widow and the dower (which are not subject to debts) and which we think should be deducted from the assets, the remainder, after paying debts, does not exceed \$500.

It is claimed that both dower and homestead were not intended to co-exist in the same estate. But it is to be observed, 1st, that the statutes giving homestead nowhere express or imply that dower shall be cut off; 2nd, dower goes to the widow—homestead is for the widow *and heirs*; 3rd, the act of 1855, p. 17, provides for setting out dower and homestead, and for deducting the widow's share in the homestead from her dower, thus expressly recognizing both dower and homestead in the same estate.

It is also claimed that the probate court should adjudge that there was a homestead, before the court of chancery can take cognizance of it, either to sell, or assign under the act.

It would be singular if the legislature had made the jurisdiction of chancery, in the matter, to depend on the decision of the probate court. There is nothing in the words of the act to show such an intent. Such a construction would require us to imply such a power and jurisdiction for the probate court against the express grant of the power to the court of chancery. It would require the probate court to act in matters in no ways connected with the estate of deceased persons, and to decide as to the existence of a homestead among persons, all of whom were alive, and where neither they nor their estates could be brought within the jurisdiction of that court. The position can not be sustained.

We find no error in the decree of the chancellor, and it is affirmed, with costs against the creditors, who have appeared and appealed, viz.: James Buchanan, W. G. Buchanan, and H. F. Slack, in this court, and in the court of chancery, from January Term, 1861, and a mandate will be directed to the court of chancery accordingly.

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THE TOWN OF RANDOLPH v. THE TOWN OF WOODSTOCK.

Deposition. Evidence.

By allowing a deposition to be read once without objection, a party waives all objections to any informality or irregularity in the taking of which he has knowledge, and thereafter he can only raise objections to the competency of the witness, or the subject matter of the deposition.

When a legal cause exists for taking a deposition when taken, the cause is presumed to exist, and the deposition continues to be admissible at any subsequent time, unless the cause be shown to have ceased by the party objecting.

A witness who was testifying in regard to a certain date, stated that he wrote a letter to one R. relative to that subject; whereupon, he was asked on cross-examination whether he did not in that letter state such date as different from what he had testified it to be. *Held*, that the inquiry was proper, and that the cross-examining party was not bound to produce the letter.

The mere fact that an improper inquiry is made of a witness while testifying, is not sufficient for granting a new trial, if no improper evidence be elicited by such inquiry.

If a witness, before there is time to check him or interpose an objection, gives incompetent or improper testimony, and the court instruct the jury that the testimony so given is not to be considered by them, there is no ground of error which can be revised by the supreme court.

APPEAL from an order of removal of one Lydia Billings, a pauper, from the town of Randolph to the town of Woodstock. Plea, that the pauper was unduly removed, and trial by jury at the January Term, 1861, PECK, J., presiding.

The controversy in the suit was as to the time of the removal of Joel Billings, the father of the husband of the pauper, with his family, from Woodstock to Hartland. On the part of Woodstock the evidence tended to show that said Joel Billings thus removed to Hartland in the spring of 1816, and on the part of Randolph that he removed in the fall of the same year. It was conceded that Joel Billings removed with his family from Hartland to Randolph August 16th, 1817, and that the present settlement of the pauper was in Woodstock, unless Joel Billings gained a settlement in Hartland, by one year's residence in that town, in 1816 and 1817.

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On trial the plaintiffs offered the deposition of Eliza Billings, taken for the alleged cause that she was unable to attend court, by reason of sickness and bodily infirmity, to which the counsel for the defendants objected, for two reasons; *first*, because the deposition was taken before J. K. Parish, Esq., a justice of the peace, who at the time of taking the same was an inhabitant of, and tax-payer in, Randolph. These facts the defendants proved to the court. *Secondly*, because there was no evidence that the deponent was, at the time of trial, unable to attend court and testify in the cause. And the defendants proved that this cause was partly tried at the June Term, 1859, and that at that time the deponent, who resided in Randolph, was in Chelsea at the time of the trial of this cause, but that she did not testify, as the witness said, because she was too feeble to be brought into court.

It was conceded that at the trial at the June Term, 1859, this same deposition, which had been taken in January previous, on due notice, to be used at that trial, was read without objection.

The court overruled the objections and admitted the deposition, to which the defendants excepted.

The defendants produced as a witness one Harley Burr, who testified in substance that he resided in Hartland in the spring of 1816, and was acquainted with Joel Billings, and that said Joel Billings was residing in Hartland in the spring of 1816, while the witness was residing there, and before July of that year, and that the witness left Hartland in August, 1816, and went to Rockingham, and never afterwards resided in Hartland. On cross-examination he stated that one William Rounds, of Chester, an attorney, called upon him in June, 1860, on behalf of the town of Woodstock, to ascertain what he remembered about the residence of Joel Billings in Hartland, and that he then told William Rounds that he would think it over and write him upon the subject; that he did afterwards write him accordingly, but that since writing he had remembered more. The plaintiffs' counsel then proposed to ask Burr whether he did not write in that letter that it was in 1817 that he saw Joel Billings in Hartland and moved to Rockingham, to which the counsel for the defendants objected, but the court overruled the

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objection, and permitted the enquiry, to which the defendants excepted. There was no evidence that William Rounds, or the town of Woodstock, or their counsel, had had any notice to produce this letter upon trial, and no reason was shown why William Rounds could not have been summoned as a witness. The witness replied to this question as follows: "I did not write him that I left Hartland in 1817. Think I did not write the year—he did not want to know that."

The defendants introduced one Cynthia Bigelow as a witness, who testified in substance that in the spring of 1816, she worked at her trade as a tailoress for about two weeks, several miles from where she resided, at a Mr. Watkins, in Hartland, a near neighbor to said Joel Billings, and that during the time that she was thus working at said Watkins' she went with her cousin, a Miss Ashley, who lived in the same neighborhood, to the house of Joel Billings, and that Joel Billings, with his family, was then living in Hartland; that she was never at Joel Billings' but once, and saw them there at no other time. On cross-examination, the counsel for the plaintiffs proposed to ask this witness what conversation she and Miss Ashley had, at the time they were at Joel Billings', about the Billings family. The counsel for Woodstock objected. The counsel for Randolph then stated that he expected to show a conversation between her, (the witness,) and Miss Ashley, which would show that it was in 1817, instead of 1816, that the witness was there. The court told the counsel that if he expected to show that the witness on the stand on that occasion said any thing which would show that it was in 1817, instead of 1816, that she was there, thus tending to contradict her testimony, he might inquire as to what the witness stated, but not as to what Miss Ashley said. To this decision the defendants excepted. The inquiry was then made, limited to what the witness on the stand stated on that occasion at Joel Billings'. The witness answered as follows: "When we left the house, after we got out, I remarked, 'the children are all bare-foot.' She said, 'yes, they have been bare-foot all winter,' but I (the witness) knew nothing about their being there the winter before." What the witness stated as to what Miss Ashley said, was said by the witness before there was time to

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check her, or to interpose any objection. The court thereupon remarked that what Miss Ashley said was no evidence for any purpose. The counsel for the defendants then said that they excepted to the admission of what the witness said Miss Ashley said.

No exception was taken to the charge.

The jury returned a verdict in favor of the plaintiffs, that the pauper and her children were duly removed.

Converse & French and *A. Tracy*, for the defendants.

E. Weston, *L. B. Peck* and *P. Dillingham*, for the plaintiffs.

POLAND, CH. J. The deposition of Eliza Billings was properly admitted to be read in evidence.

By allowing the deposition to be read in evidence on the former trial without objection, the defendants waived their right to object to it, on the ground that the magistrate taking it was an inhabitant and tax payer in Randolph, and therefore disqualified to take the deposition.

It must be assumed, that this fact was known to the agent of Woodstock, who attended the taking, and we think that by allowing a deposition to be read once without objection, the party waives all objections to any informality or irregularity in the taking, of which he has knowledge, and that thereafter he can only raise objections to the competency of the witness, or the subject matter of the deposition. When a deposition has thus been allowed to be once used without objection, the party taking it has the right to consider all objections relative to the taking waived, and may allow his witness to go out of the country, or not produce him on another trial, or take the risk of his decease, relying upon having secured his testimony, and to allow the opposite party afterwards to insist upon some informality or irregularity in the taking, would operate as a direct fraud.

The defendants insist that such waiver only applies to defects in the caption and certificate, and not to any informality in the taking not thus apparent. But in the case of *Walsh et al. v. Pierce* 12 Vt. 180, and *Perry v. Whitney*, 80 Vt. 390, irregulari-

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ties in the taking, not apparent on the face of the caption and certificate, were held to be waived by once allowing the deposition to be read without objection. When a legal cause exists for taking a deposition when taken, the cause is presumed to exist, and the deposition continues to be admissible, at any subsequent time, unless the cause be shown to have ceased, by the party objecting. Whether the evidence offered by the defendant in this case, to show a removal of the cause, was sufficient for that purpose or not, presented a question of fact for the determination of the county court, and their decision of such question is conclusive, unless it appear that they in some way misapplied the law to the facts proved.

In this case we can not say there was any error in judging upon the evidence, or in the application of the law to the facts proved.

We think there was no error committed in the court below, in allowing the question to be asked on cross-examination of the defendants' witness Burr, whether he did not in his letter to Rounds, state differently from what he testified.

We fully recognize the rule that the contents of any writing can not be proved by parol, except when it be shown that the writing is lost, or for some other reason can not be produced. But here the question was wholly collateral; the whole inquiry was for the mere purpose of affecting the credit of the witness, and not to prove any fact in issue in the case.

It does not appear that the plaintiffs had any knowledge that such witness was to be produced at the trial, or that the plaintiffs had any knowledge that he ever wrote a letter to Rounds, until the witness stated it on the stand, and of course they could not be expected to have possession of the letter, or be able to produce it.

It is now well settled that a witness can not be impeached or contradicted by evidence of his statements out of court, differing from his statements in court, unless he be first enquired of as to the statement, and afforded an opportunity to make any explanation he chooses in reference to it, and we are not aware that any distinction has been made between verbal and written statements. If there is not, then the plaintiffs were bound to first

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ask the witness before they would be allowed to contradict him, even by producing the letter. The plaintiffs must of course take the witness' statement as to what he wrote, unless they were prepared to contradict him by producing the letter, and could not prove its contents by witnesses without showing its loss.

We are aware that on this question there is some conflict of authority in reported cases, and in elementary books, but the practice in this state has always been in accordance with the decision below. While witnesses were excluded from testifying if interested in the cause, in all preliminary inquiries of witnesses on the *voir dire*, in reference to their interest, it was always allowed to examine them in reference to the contents of any writings that might affect their interest, and this was allowed on the ground that the party might not know what witnesses were to be produced against him, and of course could not be expected to be prepared to produce such writings. This rule is fully recognized by all the writers on the law of evidence, and is very analogous to the question here raised. But however the rule might be, there would not seem to be any room for the defendants to complain, for the plaintiffs failed to draw from the witness, that his letter contained any thing different from his testimony on the stand. We can not accept the view of the defendants' counsel, that a judgment must be reversed, if an improper question is allowed to be asked, though no improper evidence be obtained by his answer. Suppose a party offers to prove by a witness some fact, which is clearly improper and inadmissible, and the offer is objected to, but the inquiry is allowed, and the witness answers that he has no knowledge on the subject, is this error for which the party objecting is entitled to a new trial? We think not. The admission of improper evidence is ground of error, but merely because the court would have admitted it, if the party had it to give, is not.

The statement of the witness, Mrs. Bigelow, as to what Miss Ashley said, was not admitted as evidence. The court decided that it was not admissible evidence, but the witness in the course of her testimony stated it. The court took the precaution to counteract it, by stating to the jury, it was not proper evidence.

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It can not be said this was admitted by the court as evidence, and though stated by the witness, against the decision of the court, the county court were not bound to treat it as evidence, or to stop the trial. If every trial, in the course of which some witness, either by ignorance or design, makes some remark which is not proper evidence, must be regarded as a *mistrial*, very few verdicts could stand. With the extreme caution exercised by the court in this instance, we think there is not the slightest ground to believe the defendants were prejudiced by the witness' statement, but if they were, it can not be treated as an error of the court which can be revised here.

The judgment is affirmed.

ISAAC P. WHITCOMB v. DANIEL C. GILMAN.*Book Account. Contract. Illegal Contract. Sunday.*

As a matter of law it is not always unnecessary to work on Sunday to prevent a great waste of sap, in making maple sugar.

If a party who has contracted to labor for another for a certain time, at a fixed price per month, with a proviso, that if either party become dissatisfied before the expiration of the time agreed upon, he may terminate the contract, does become dissatisfied, and terminates the contract he may recover for the time he has worked at the stipulated price per month.

BOOK ACCOUNT. The auditor reported that the first item of the plaintiff's account was for labor from December 26th, 1859, to July 11th, 1860, at the rate of fifteen dollars per month; that shortly before the 26th of December, 1859, the plaintiff contracted with the defendant to work for the latter, at general farm work, for one year from that date, at fifteen dollars per month, with a stipulation that either party should have the right to terminate such contract at any time during the year when he should become dissatisfied and desire to terminate it; that the

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plaintiff worked for the defendant under this contract until July 11th, 1860, when he became dissatisfied, mainly with the distance he had to go on foot to his daily work, and on that account left the employment of the defendant at that time.

The defendant claimed that the plaintiff, if entitled to recover any thing for such labor, was entitled to recover only what his services were reasonably worth, and gave evidence tending to show that during the portion of the year the plaintiff did work, his labor was not worth fifteen dollars per month.

The second item was for labor by the plaintiff for the defendant, on two Sundays, under the following circumstances: In the spring of 1860, the defendant carried on a sugar place. He told the plaintiff he would pay him extra for work he should do in such sugar place on Sundays. The plaintiff worked in the sugar place on two Sundays, when it was necessary in order to save a great waste of sap, and the auditor found that the plaintiff's charge for such labor was reasonable.

Upon these facts the county court, at the June Term, 1861, PECK, J., presiding, rendered judgment for the plaintiff, for the amount of both items of his account, to which the defendant excepted.

A. Howard, for the defendant.

S. M. Gleason, for the plaintiff.

ALDIS, J. I. The auditor finds that the plaintiff worked two Sundays in the sugar-place, at the request of the defendant, "when it was necessary in order to save a great waste of sap." The necessity of the work is established, unless in the eye of the law it never can be necessary to work on Sunday to prevent a great waste of sap.

In the business of making maple sugar, it is extremely difficult to tell when there will be an abundant flow of sap, and to provide fully for it. Perhaps there is nothing in ordinary farm work more uncertain. When the weather is just right and the advance of spring, the frost, the snow, the air and the sunshine, are propitious, there will sometimes be an extraordinary flow of sap, calling for much extra labor to save it, though lasting perhaps

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only one, two or three days. The opportunity well improved secures to the farmer an abundant reward, and constitutes the chief profit of the season :—neglected, a great loss is incurred. We cannot say that it would be unnecessary in all cases to prevent such waste. A religious man would by gathering his sap on Saturday, and by furnishing ample storage for it, provide as far as possible against such necessity. Still, unavoidable circumstances may produce the necessity. Indeed the individual condition and necessities of each man may go far to determine whether it is his duty to labor on Sunday to save property from destruction. The saving of a piece of property to one man might prevent great misery and suffering to himself and family—to another it might be of no consequence. It is easy to suppose cases where every one would recognize the duty of working on Sunday to prevent the immediate destruction of property—as in the case suggested by counsel of the burning of a dwelling-house. But it is needless to dwell on the point.

II. The term of service was one year—but with this proviso—that each party might terminate the contract *at any time* if he should become dissatisfied and should desire to so terminate it. It was not—"if he had good reason to be dissatisfied," as in *Patrick v. Putnam*, 27 Vt. 759 ; or "if the cause of dissatisfaction could not be removed," as in *Seaver v. Morse*, 20 Vt. 620. Here each party reserved the right to judge of the cause of dissatisfaction for himself—and, if really dissatisfied, to put an end to the contract. It is like *Prevost v. Harwood*, in the 29th Vt. 219, where the plaintiff reserved the right "to quit at any time if dissatisfied." The court held in that case that the plaintiff's leaving the defendant's service *without cause* was no violation of the contract. But here he had cause. It is said, however, that in that case the plaintiff only recovered what his services were worth for the time. But as the plaintiff took no exceptions in the case and only claimed what the services were reasonably worth, the question whether he could have recovered according to the contract price did not arise. The same is true in *Hubbard v. Belden*, 27 Vt. 645. But as there was no breach of contract by the plaintiff, as in leaving he only exercised his right under the contract—a right which belonged alike to each party—we

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think he has in fact fully performed according to the terms of the bargain, and can recover the contract price.

The cases which have been cited where the party is excused from full performance by sickness stand upon a different ground. Such are *Fenton v. Clark*, 11 Vt., *Seaver v. Morse*, 20 Vt., and *Hubbard v. Belden*, and *Patrick v. Putnam*, in the 27th Vt.

Judgment affirmed.

WILLIAM WOOD v. EZRA ADAMS, CORNELIA ADAMS AND
ZELOTES BIGELOW.

[IN CHANCERY.]

Mortgage. Foreclosure. Homestead. Practice.

The proceeding by petition in accordance with the act of 1852, entitled "an act to diminish the expenses of foreclosing mortgages in equity," (Acts of 1852, No. 12, p. 9,) is as proper in disputable as in undisputable cases of foreclosure.

A. agreed with the orator to buy a farm for \$1800, and gave a mortgage of his homestead, signed by himself and wife, to secure the payment of five hundred dollars of the price. When this five hundred dollars should be paid, he was to have a deed of the farm, and was to mortgage it back for the balance of the price. He took possession of the farm, and at the end of the year, being unable to raise to \$500, and the orator being unable to give a perfect title to the farm, it was mutually agreed between them not to go on with the trade, but that the mortgage of the homestead should stand as security for the value of the use of the farm for the past year, which was fixed at two hundred dollars. *Held*, that this agreement was binding as against the homestead.

PETITION for the foreclosure of a mortgage.

The facts sufficiently appear from the opinion of the court.

Wm. Hebard, for the orator.

P. Perrin, for the defendants.

ALDIS, J. I. This is a petition to foreclose a mortgage under the statute to diminish the costs of proceedings in equity. The defendants have answered, and testimony has been taken as is

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usual in litigated cases commenced by bill. It is objected that the statutory mode of proceeding by petition is to be used only in cases where no defence is made; and that where the facts are in dispute, the only proper mode of proceeding is by bill. There is nothing in the statute to indicate such an intent. The mode of proceeding by petition is as convenient in practice for the trial of disputable cases as the old mode. The general practice in the state since the passage of the statute has been to begin by petition in all foreclosure cases, whether contested or not; and this court has heretofore recognized the practice as proper and legal. This objection is untenable.

II. The defendant, Ezra Adams, agreed with the orator to buy a farm for \$1600. For five hundred dollars (the first instalment towards the price,) Adams gave his note secured by a mortgage of his homestead;—the mortgage executed by him and his wife,—the note signed by him alone. For the rest he gave his own notes. When this five hundred dollars was paid he was to have a deed of the land and to mortgage it to secure his other notes. Adams took possession of and occupied the farm one year. Then, he being unable to raise the five hundred dollars, and the orator being unable to give him a perfect title, it was mutually agreed not to go on with the trade, but that Adams should surrender the possession of the farm to Wood, and pay for the year's use of it, and Wood should give up the notes he had taken for the purchase money. The value of the year's use was left to arbitrators, who awarded two hundred dollars, and Wood and Adams after publication of the award signed a writing by which the five hundred dollar note and mortgage was to remain a security in Wood's hands for the payment of this two hundred dollars, and this suit is brought to collect the two hundred dollars, by foreclosing the mortgage.

The defendants claim that the wife's interest in the homestead is discharged from the operation of the mortgage, and that no decree should pass against her.

If the original bargain for the purchase of the farm was wholly abandoned, and given up, and the agreement to submit to arbitrators the question of how much Adams should pay for the year's use, was a new and independent agreement, then the mort-

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gage which was merely security for the old agreement might be considered as at an end so far as the wife was concerned. But if the two hundred dollar note and its security by mortgage was a part of the agreement to give up the trade, and the security and payment of this two hundred dollars was to be the condition on which the old trade was to be abandoned, then we think the five hundred dollar note and mortgage would be in force till the two hundred dollars was paid.

The agreement in writing signed by Adams and Wood, and all the other evidence tend to show that the five hundred dollar note and mortgage were kept on foot for the very purpose of securing this two hundred dollars, and were not to be discharged till this sum was paid. Nor was this sum of two hundred dollars a debt disconnected with the purchase of the farm,—the separate liability of the husband, and which, as against his wife, he would have no right to make subject to the mortgage. On the contrary, it was a value he had received from the use of the farm for which in part the five hundred dollar note and mortgage were given. To obtain the discharge of the mortgage (which was a benefit to the wife,) he was obliged to pay or secure this sum of two hundred dollars; and its payment therefore enured to her benefit. The husband was authorized to negotiate for the giving up of the trade, and of the securities which he and his wife had given upon the purchase. This authority existed by virtue of his relation to her, and the liability in regard to the mortgage of the homestead which they had jointly assumed. Nobody else could act for her, nor could she act for herself so as to make a binding contract. If any one therefore was to act to obtain a discharge of the mortgage, it was the husband.

If the bargain for abandoning the purchase is to be itself abandoned, and the original bargain to be revived, then the note and mortgage would be in force to become the subject of litigation, which might be expensive and injurious to the wife's interests. The husband, both for himself and wife, might well desire to avoid such controversy; and his negotiation and settlement we think were lawful and beneficial both as to his wife and himself.

The decree is affirmed.

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ELIHU S. FOSTER v. JOHN PHALEY AND ALVA BUTTON.

Promissory Note. Failure of Consideration. Contract.

The defendant purchased certain premises and gave the promissory note in suit to the grantor in part payment therefor. He entered into possession and occupied the premises for two years. The use of the premises was worth more than the amount of the note, but during his occupation the defendant expended as much in repairs as the value of the use of the premises. His grantor's title having entirely failed, the defendant sought to defend an action upon the promissory note upon the ground of failure of consideration. *Held*, that to establish this defence it must appear that the repairs made by the defendant were necessary in order to render the use of the premises of any value.

Held, also, that the fact that the defendant continued to occupy the premises during the pendency of the controversy which finally resulted in establishing the defect of his grantor's title, without offering to rescind his contract of purchase of the premises, was no waiver of his right afterwards to insist upon a failure of consideration as a defence to the promissory note given for such purchase.

ASSUMPSIT upon a promissory note signed by the defendant Phaley, as principal, and by the defendant, Button, as surety, dated April 8th, 1857, for one hundred and fifty-two dollars, payable to John Longee, or order, in thirty days from date, and interest annually. Plea, the general issue and trial by jury at the January term, 1860, BARRETT, J., presiding.

It appeared in evidence that the note in suit was, with others of the same date, executed by the defendant to Longee, for a saw mill and appurtenances in Tunbridge. And that it was transferred by indorsement from Longee to Foster on the 21st of May, 1857, and that the plaintiff paid a full consideration for the note.

It further appeared that on the 15th day of March, 1854, Daniel Kelsey executed to Daniel Tarbell, Jr., a note for \$2466.98 payable to Tarbell on demand, and, to secure the payment thereof, also executed to Tarbell a mortgage of said saw mill; that in the April following Tarbell transferred said note to Keith, Hyde & Co., as collateral security for a demand of \$750, which Tarbell was then owing them; that during the summer of 1854, that sum was reduced by payments made by Tarbell to

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\$139.00; that while this note was in the hands of Keith, Hyde, & Co., Solomon Downer commenced a suit against Tarbell and therein summoned Kelsey, as Tarbell's trustee; that soon after said process was served upon Kelsey, Tarbell, without payment of the balance of \$139.00, obtained possession of the note from Keith, Hyde & Co., without their consent, and sold and transferred said note to Longee for a full consideration; that Tarbell then as signed to Longee the mortgage executed by Kelsey, upon the mill; that Longee afterwards commenced a suit in chancery to foreclose the mortgage; that at the January term, 1860 of the Orange County Court of Chancery, a final decree of foreclosure was rendered therein in favor of Longee, against Kelsey; and that this decree expired without redemption in February, 1857; and that thereupon Longee took out a writ of possession, and on the 7th of April, 1857, was put into possession of the mill; that on the 8th of April, 1857, Longee deeded the saw mill to the defendant Phaley, and took therefor certain notes, and among others the note now in suit.

It further appeared that Kelsey appeared before a commissioner on the 27th of August, 1855, and from the disclosure and proofs given, the commissioner decided that Kelsey was the trustee of Tarbell to the amount of said note, deducting some payments made by Kelsey to Tarbell, unless Messrs. Keith, Hyde & Co., and Longee, or either of them, upon the facts found by said commissioner, might rightfully claim the avails of said note; that Keith, Hyde & Co. perfected their claim to the note for the balance due them, and that Longee was duly cited by the county court in which Downer's suit was pending, to appear as claimant in that suit of the effects in Kelsey's hands; that Longee appeared and contested his claim; that the suit was tried between Downer as plaintiff, and Longee as claimant; and that it finally resulted at the February Term of the supreme court for Windsor County, 1859, in the recovery by Downer of a judgment against Kelsey as trustee, and a judgment against the claim of Longee.

It further appeared by the testimony of Phaley that he had commenced a suit against Longee, which was still pending, upon the covenants in his deed on the sale of the saw mill to recover damage for the failure of the title.

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It further appeared that Phaley went into the occupancy of the saw mill at the time of the purchase, and held possession of the same under his contract of purchase with Longee till March, 1859, when he was notified to pay rent thereafter to Downer; and that Downer's claim was known to Phaley in the early part of the summer of 1857, and before the commencement of the present suit.

It also appeared that during the first year that Phaley occupied the mill under his contract with Longee, he expended about one hundred dollars in planking the dam, and other repairs, and that in the summer of 1858 he took out the old work in the mill and put in two new water wheels, at an expense of about \$170, and a balance wheel of about \$30; and that the use of the mill per annum was worth about \$210.

There was no testimony that Phaley had ever offered to give up the trade, or to deed the premises back to Longee, or to give up the possession of them to him, or to the plaintiff.

The plaintiff claimed and requested the court to charge the jury that the defendant could not avoid the contract, on the ground of a partial failure of consideration; and that if the defendant had the use and occupancy of the mill during the time he held under his contract with Longee, and thereby received the beneficial use of the mill, that constituted at least a partial consideration; that under the decree, obtained by Longee against Kelsey, the possession of the mill belonged to Longee, and to the defendant under his deed from Longee, and that Downer was not entitled to demand of Longee nor Phaley any rents or profits accruing before the decision of his case in the supreme court as above set forth.

The court substantially so charged. But the court further instructed the jury, that they should take the repairs made upon the mill in connection with the use of the mill, and that if Phaley laid out more in repairs than the use of the mill was worth during the time he occupied under Longee's deed, no benefit resulted to him, and consequently Phaley got nothing by his possession, and there would nothing remain in the hands of Phaley, as part consideration of the purchase; and if so, upon that point their finding should be for the defendant.

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To that part of the charge in relation to the repairs upon the mill, and their application towards the use of the mill, the plaintiff excepted.

The plaintiff also requested the court to charge the jury that if the defendant, after his knowledge of Downer's suit against Tarbell, and Kelsey as trustee, and of the claim of Downer to the premises, by virtue of that process, continued to hold and occupy the same, without an offer to rescind, and restore the party deeding to his former situation before the sale, this would be such a ratification of the contract as would bind the defendant to pay the note, notwithstanding any want or failure of the consideration in the note.

The court declined so to charge, but did charge, in substance, that Phaley, having bought the mill, and knowing the fact of Downer's claim, and the contest in relation to it, was entitled to hold on to the mill, without any offer to rescind, to await the result of litigation between Downer and Longee; and that Phaley, until that decision was had, had the right to withhold payment of the note, without any such offer. To the refusal to charge upon this point as requested, and to the charge as given, the plaintiff excepted.

A. M. Dickey, for the plaintiff.

C. B. Leslie, for the defendant.

PIERPOINT, J. The note upon which this suit was brought, was given by the defendant to John Longee for a part of the purchase money agreed to be paid by the defendant Phaley to Longee, for a saw mill and the appurtenances, which Phaley had bought of Longee. The note was endorsed to the plaintiff after it fell due, and the defence now set up is, that there was a failure of the consideration.

It appears from the case that in March, 1854, one Daniel Kelsey owned the saw mill in question, and, while owning the same, mortgaged it, together with a farm in Tunbridge, to Daniel Tarbell, Jr, to secure the payment of a note for \$2,466.98. This note Tarbell afterwards transferred to Keith, Hyde & Co.,

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as collateral security for a debt he owed them, which debt he subsequently reduced by payments, to the sum of \$139. Tarbell did not assign or deliver the mortgage to Keith, Hyde & Co. In the meantime Solomon Downer sued Tarbell on a note for \$5000, and trusted Kelsey as Tarbell's debtor. Soon after this Tarbell, by some means, got possession of Kelsey's note without in any way discharging Keith, Hyde & Co.'s lien thereon for the \$139. This note he sold and transferred to Longee, and also assigned to him the mortgage executed by Kelsey to secure its payment. By this transfer Longee acquired all of Tarbell's interest in the note and mortgage. This interest was subject to Keith, Hyde & Co.'s lien upon the note as collateral security for the \$139, and to such rights as Downer acquired by virtue of his proceedings against Tarbell and his trustee Kelsey. What would be the result of that proceeding of course could not then be known. It was a matter of litigation between the parties. Downer might fail in establishing his claim, or he might obtain a judgment against Kelsey for the whole amount of the debt due to Tarbell over the \$139. After Longee had purchased the note and mortgage he commenced proceedings in chancery against Kelsey to foreclose his equity of redemption in the mortgaged premises. It does not appear that Kelsey, who was of course aware of these claims upon the debt due from him to Tarbell, made any attempt to resist such proceedings in chancery, or if he did, it was of no avail, for Longee obtained a decree against him which finally became absolute, and on the 7th of April 1857, he was, by virtue of a writ for that purpose, put into the possession of the mortgaged premises. This decree is still in full force. The legal effect of that decree was to vest in Longee Kelsey's right of redemption. It is true Tarbell got the note from Keith, Hyde & Co. surreptitiously, still they only had an interest in it to the amount of \$139. The balance belonged to Tarbell as against them, and whether the note was in Keith, Hyde & Co.'s or Tarbell's possession, would not affect their respective interests in it, nor prevent Tarbell's selling and transferring such interest as he had in it. Downer's claim was wholly uncertain and contingent, depending upon the result of his suit, and as against him Tarbell was entitled to the possession of the note. The

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mortgage he had not assigned. He clearly had such an interest in this note and mortgage, that he could proceed against Kelsey to foreclose the right of redemption, and if so, the assignment to Longee gave him the same right.

Longee having obtained a decree against Kelsey and possession under it, such decree is conclusive while it remains in force: whether circumstances might not arise out of the various transactions that would justify a chancellor, on proper application, in vacating that claim, is a question we are not now called upon to decide.

Immediately after Longee had taken the possession under his decree, he sold the mill to the defendant Phaley, and took therefor, among other notes, the note now in suit. Longee's deed to Phaley contained the usual covenants of warranty and seisin, and Phaley immediately took possession of the premises and continued in possession until March, 1859, a period of nearly two years. Under the circumstances, he had an undoubted right to the possession for this period without being liable to any one for the rents and profits, as neither Keith, Hyde & Co., nor Downer had so perfected their rights as to stand in any position to question his right. The use of the mill is found to be worth \$210 per year. No question seems to have been made in the county court as to the effect of the covenants of warranty in Longee's deed to Phaley, or of the fact that Phaley commenced a suit thereon before the commencement of this suit, upon the question of a consideration for the notes, or of a ratification of the contract: and therefore, of course, no such question can now be raised here; but the only questions for our consideration arise upon the charge of the court in answer to the requests of the plaintiff. The plaintiff requested the court to charge the jury "that the defendant could not avoid the contract on the ground of a *partial want*, or failure of consideration, and if the defendant had the use and occupancy of the mill during the time he held it under his contract with Longee, and thereby received the beneficial use of the mill, that constituted at least a partial consideration; that, under the decree obtained by Longee against Kelsey, the possession of the mill belonged to Longee and to the defendant under his deed, and that Downer was not entitled to demand of

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Longee or Phaley any rents or profits accruing before the decision of his case in the supreme court as above set forth."

With this request the court substantially complied, but further said to the jury "that they should take the repairs made upon the mill in connection with the use of the mill; and that if Phaley laid out more in repairs than the use of the mill was worth during the time he occupied under Longee, no benefit resulted to him, and consequently Phaley got nothing by his possession, and there would nothing remain in the hands of Phaley as part consideration of the purchase; and if so, upon that point their finding should be for the defendant." It is insisted on the part of the plaintiff, that in respect to this part of the charge there was error. It appears that while Phaley occupied the mill, he expended about one hundred dollars upon the dam, took out the old wheel and put in two new cast-iron Buxton water wheels, and a balance wheel, at an expense of about two hundred dollars. Now if it was necessary that Phaley should make these repairs and improvements in order to obtain the beneficial use of the mill, and they were necessary to be made, to render the use of the mill of any substantial value, then the charge of the court was correct, and it was probably in this view that these instructions were given to the jury. But there is nothing in the language used that would indicate to the jury, that they were to regard it in that light, neither is there any evidence referred to in the case to show that the jury would probably so regard it, with reference to such evidence; in short there is nothing in the case to show that the repairs and improvements were necessary, or that they really increased the value of the use of the mill during the period that Phaley occupied it.

As the case stands, Phaley had the beneficial use of the mill to the extent of about four hundred dollars, and to that extent at least it cannot be said that there was a failure of consideration for the notes, and, as the principle is well settled in this state, that a partial failure of consideration cannot be set up as a defence, the plaintiff was entitled to a verdict so far as this point is concerned, unless the fact that he had expended an equal amount in repairs upon the premises under the circumstances in which they were made in this case, is a sufficient answer to that position.

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As has been already said, if the expenditure in repairs was necessary to render the use of the premises of value, so that in fact it cost Phaley to keep the premises in repair, so that the mill could be beneficially used, all that could be realized therefrom, then he has received nothing that can be called a partial consideration for the notes. This is but another mode of stating the proposition that the use of the premises was worth nothing. But, on the other hand, if the repairs were not necessary to be made in order that the defendant, Phaley, could realize the benefits of the use of the premises, as may have been the case from the facts stated, but such repairs were made as permanent improvements, with a view to ultimate benefits to be derived therefrom, and not with reference to any present necessity; in such case we think the money so expended should not be set against the use of the premises so as to destroy its effect as a part consideration for the notes, and establish the fact that the use of the premises was of no value, especially as these repairs were made after he was fully aware of Downer's claim.

In this view of the case we think the charge of the court was erroneous. The jury should not only have been required to find that a sum had been expended in repairs equal to the use of the premises, but also that the repairs were necessary to make such use valuable, in order to warrant them in finding a verdict for the defendant on this point.

In respect to the other point on which the court was requested to charge the jury, we think the charge of the court was entirely correct in asserting that Phaley had the right to hold the premises until the question of Downer's right was settled without prejudicing his right to rescind the contract. Downer, and Keith, Hyde & Co. might fail in establishing their claim. Neither had any direct lien upon the land, and, for aught Phaley knew, might never succeed in establishing one. Under the circumstances of this case, his retaining the possession cannot be regarded as an affirmation of the contract.

Judgment reversed and case remanded.

Harriman v. School Dist. No. 12.

FREDERICK H. HARRIMAN v. SCHOOL DISTRICT NO. 12, IN
ORANGE.*Collection of Taxes.*

A tax collector who has distrained property for the payment of a tax, may post such property for sale before the expiration of four days from the time of taking the property, provided the day fixed for the sale is six days from the expiration of the four days allowed the owner to redeem the property.

SPECIAL ASSUMPSIT to recover the amount paid by the plaintiff upon a judgment against him in favor of one Fifield, for distraining certain property of the latter in payment of an invalid tax against him, laid by the defendant school district, of which the plaintiff was the collector.

The facts in the case sufficiently appear in the opinion of the court.

The cause was tried upon the plea of the general issue, at the January term, 1861, PECK, J., presiding.

The county court rendered judgment for the plaintiff, to which the defendant excepted.

Peck & Colby, for the defendant.

Wing, Lund & Taylor, for the plaintiff.

BARRETT, J. It is conceded that the tax was void, and that, so far as this fact is concerned, the district would be bound to indemnify the collector for the consequences of collecting it. But it is urged that, though on the trial of the suit against the collector, the case was just, and the judgment was rendered against him on that ground, still, as the district was not party to that suit, they were not concluded by that judgment, in reference to the ground of the plaintiff's right and their liability in this suit; and so, they may, in this suit, show that there was another ground upon which the collector would have been cast in that suit, independently of the illegality of the tax itself, and growing out of the illegal course which he took in the collection of the tax.

In the view we take of the case, it is not necessary to discuss

or decide the question as to the effect of that judgment on this suit. For, admitting it to be as the defendant claims, in this respect, we think the course taken by the collector in distraining and selling the property is not subject to the imputation of illegality which the defendant makes against it.

The point is that the collector, after the distraining of the property, held it only *three* instead of four days, before posting it for sale. It turns out that the day fixed for the sale was full six days after the expiration of the four, within which the owner of the property might redeem it by paying the tax and costs as provided by the statute.

The statute does not, in terms, fix the time when the property shall be posted. It fixes the time within which the owner may redeem it, viz : four days. It fixes also the length of time after the expiration of said four days, that the collector must have the property posted before he makes the sale of it, viz : six days.

The collector, of course, can do nothing to obstruct the right of the owner to redeem by paying the tax and all legal costs and charges at any time within the four days, and such costs and charges would not, of course, embrace any charge for the posting of the property before the expiration of the time limited for the redemption of it without sale.

On the other hand, under this exemption from additional charges, there seems to be no reason why the posting of the property may not be made before the expiration of said four days, without contravening the provisions of the statute, provided it fix the time of sale at the lawful period after the expiration of said time of redemption. The owner of the property would be put to no disadvantage, either in respect to the redemption or the sale of it. All the purposes designed to be served by the posting of the property as prescribed by the statute, would be as well served in the one case as the other. There is no practical purpose to be served, therefore, by holding that the posting of the property, as it was done in this case, should render the taking of the property illegal, and the officer a trespasser. ●

We are not unmindful of the rules established by many decisions requiring, in proceedings for the assessment and collection of taxes, a strict compliance with the provisions of the statute.

But in this case, we think there was no such lack of compliance as would render the taking of the property illegal and wrongful.

As to demand of payment. There was evidence tending to show that such demand was not made before the bringing of the suit: and, although it is not stated in the exceptions, in terms, what the court found in this respect, still as judgment was rendered for the plaintiff, if that fact was necessary in order to entitle the plaintiff to maintain his action, it is to be taken that such fact was found by the court. *Card v. Sargent*, 15 Vt. 398. *Seward v. Hefin*, 20 Vt. 144.

In order to predicate error in the judgment in this respect, it should appear that the court did not find that fact. Hence, without passing on the question of the necessity of such demand, we think the exceptions do not show any error in this respect.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WASHINGTON,
AT THE
AUGUST TERM, 1862.

PRESENT:
HON. LUKE P. POLAND, CHIEF JUDGE,
HON. ASA O. ALDIS,
HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.

Green v. Holden.

CHARLES GREEN v. LEONARD P. HOLDEN.

Replevin by a debtor of goods attached.

Replevin by a debtor of his goods when attached by a creditor, is not an adversary writ, and the writ is not to be entered in court upon the docket as in ordinary cases. It is only an appendage to the original action, and all proceedings in reference to it must be had as a part of the original action.

REPLEVIN for a quantity of leather which had been attached as the property of the plaintiff on a writ in a suit against him in favor of the defendant, Holden, returnable to the March Term, 1860, of the Washington County Court. The writ of replevin was returnable to, and was entered in, the same court at the September Term, 1860, and the action was continued from term to term until the March Term, 1862, when the defendant, Holden, filed a motion to dismiss this action of replevin for the reason that the plaintiff, Green, had not executed to the defendant, Holden, a bond agreeably to the provisions of the statute in such case. The defendant also moved for a return of the property replevied to him.

On hearing the motion it appeared that the original writ in favor of the defendant, Holden, against the plaintiff, Green, upon which the property in question was attached, directed the goods, chattels or estate of the plaintiff, Green, to be attached to the value of two thousand dollars, and that this direction was correctly stated in the writ of replevin. But it appeared from the officer's return of service on the writ of replevin and the bond therein referred to, which was annexed to the said return of service, that the penal sum of the bond which was taken to the defendant, Holden, from the plaintiff, Green, by the officer who served the writ of replevin, before the making of such service, was only fifteen hundred dollars.

The county court, KELLOGG, J., presiding, *pro forma*, rendered a judgment dismissing the action on such motion, and also ordered the property replevied to be forthwith returned to the defendant.

To this judgment and order the plaintiff, Green, excepted.

Dillingham & Durant, for the plaintiff.

Redfield & Gleason, for the defendant.

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POLAND, CH. J. We have found no occasion to determine the questions that have been made and discussed by counsel; for in our judgment the case has been brought here under an entire misapprehension of the true character of this species of replevin. There is in fact no such case or suit between these parties, as can furnish a legal foundation for a judgment for, or against, either. Replevin by the debtor of his goods when attached by a creditor, is in no sense an adversary suit; the party at whose instance the replevin is made, claims no right against the creditor who made the attachment, and complains of no wrong done by him. This is made perfectly apparent by the form of the writ given by the statute in such cases. There is no plaintiff and no defendant. The creditor is not called upon to answer to any claim or complaint of the debtor, nor is the validity or propriety of the attachment disputed, or the interference or judgment of the court asked for in any way. Replevin of this character is wholly a creation of the statute, but that does not contemplate or provide for any judgment, as in the other classes of replevin which are adversary suits.

It is clear, too, from the language of the statute, that a writ of replevin of goods attached, brought by the debtor, is not to be entered in court upon the docket like ordinary cases, but the writ and bond taken are to be returned to the clerk of the court where the original suit is returnable, and he is to *keep the same on file*. The condition of the bond is not, to prosecute the suit to judgment and return the property if the court shall render judgment for a return, as in the other cases of replevin, but to return the property to be taken in execution, or pay the creditor's judgment.

This writ of replevin is only a mode provided by the statute, by which the debtor can compel a restoration of his property which has been attached, by his giving security to the creditors; a compulsory mode of receipting property attached.

We regard such a writ of replevin, not as an independent original action or suit, but as a part of, or appendage to, the original action; and that if any application is made to the court growing out of such replevin, and the court take any action thereon, such application must be made, and such action had, as

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a part of the proceedings in the original action, and if this court have any power to raise such action of the court, it can only be done by bringing up the original action itself.

It is quite obvious, that unless the court had power in such cases to interfere by some order, where bonds are defective, or insufficient, or become so in the course of the proceedings, very great injustice might ensue; but we have no occasion now to decide as to the existence or extent of their authority in such cases.

The attention of the court below seems not to have been asked, or given, to the nature of this proceeding, as the judgment was merely *pro forma*, but as no judgment could legally be rendered, either to dismiss the action, or for a return of the property, that judgment is reversed; and as there is no case to remand, and nothing to be tried if remanded, the exceptions are dismissed.

EDWARD T. SWEETZER v. SAMUEL D. JONES, J. B. SPALDING
AND E. N. SPAULDING.

[IN CHANCERY.]

Mortgage. Fixtures.

A mortgagee of certain land conveyed another piece of land, and in such conveyance described the property so conveyed as subject to his mortgage. *Held*, that, as against the grantee and all persons claiming under him, the land conveyed was as effectually charged with the incumbrance of the mortgage debt, as if it had been expressly mortgaged therefor.

The boilers and steam engine in a marble mill, which supplied the motive power of the machinery of the mill, and were set up and used for the beneficial enjoyment of the mill, and substantially annexed to it, *held* to be fixtures and part of the realty, notwithstanding the machinery moved by the engine could be readily removed without injury to the building.

Saw frames in such a mill, fastened, at the top and bottom, to the building by bolts and nuts for the purpose of steadying the saws, *held* to be chattels and not fixtures.

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PETITION for the foreclosure of a mortgage. The facts in the case fully appear in the opinion of the court.

Peck & Colby, for the orator.

Redfield & Gleason, for the defendant E. N. Spalding.

KELLOGG, J. This is a bill of foreclosure on a mortgage from the defendant Jones to Wentworth S. Butler, of certain lands, buildings, machinery, etc., in Roxbury, the mortgage having been duly assigned to the orator. The defendant E. N. Spalding, in his answer, states that, on the 21st December, 1857, he caused a portion of the real estate described in the orator's bill, with a steam engine and boiler situated thereon, and the tools and machinery, and all the personal property, in and about the buildings on said premises, to be duly attached on a writ in his favor against the Roxbury Verd Antique Marble Company, and that, at the March Term of the Washington County Court in 1858, he recovered a judgment against said company, and that, on the 28th June, 1858, he caused the execution issued on the said judgment to be levied upon the property so attached, and that the real estate so levied upon was duly set off to him on said execution, and that the said engine and boiler and other machinery and personal property so levied upon, was legally sold on the said execution; and he insists that the title of all the property so levied on, set off, and sold, was vested in the said company at the time of the said attachment, that, by virtue of said levy, set off, and sale, he obtained an absolute title to the real and personal estate included in the levy, and that the steam engine and boiler, and also the machinery, situated in the buildings on said premises, were personal chattels and subject to attachment as such. Under this sale and levy, this defendant by his answer makes a claim to a certain piece of land containing about six acres, with a mill upon it for sawing and manufacturing marble, and a stationary steam engine and the boilers and the saw frames in the mill. All the questions made in the case arise upon the answer of this defendant.

The title, on the part of the orator, to the property in controversy is derived from a mortgage deed from the "*American Verd*

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Antique Marble Company" to Josiah W. Butler, dated September 25th, 1855, executed to secure the payment of the sum of twenty-five thousand dollars. It is conceded that, at the date of this mortgage deed, the title to the six acre piece on which the mill was situated was in one Alvin Braley, although the mill was then used and occupied by the mortgagor. The title of Braley was conveyed to William Plumer by deed, dated March 5th, 1856, and Plumer conveyed the same title to the said Josiah W. Butler by deed, dated February 7th, 1857, and Josiah W. Butler conveyed the six acre piece to the "*Verd Antique Marble Company*" by deed dated March 10th, 1857, and the said last named company conveyed the same to the "*Roxbury Verd Antique Marble Company*" by deed dated April 18th, 1857. The two last mentioned deeds expressly subject the premises thereby conveyed to the incumbrance of the mortgage deed executed by the "*American Verd Antique Marble Company*," to Josiah W. Butler, as above mentioned, and the deed from the "*Verd Antique Marble Company*" to the "*Roxbury Verd Antique Marble Company*" contains a provision that the grantee shall pay the said mortgage, and a statement that the agreement of the grantee to make this payment was a part of the consideration expressed in the deed. This mortgage deed having been assigned to the said Wentworth S. Butler, he commenced a foreclosure suit thereon against the *American Verd Antique Marble Company* and the *Roxbury Verd Antique Marble Company*, in which a decree of foreclosure, covering the six acre piece as well as the other real estate described in the mortgage, was made at the March Term of the Court of Chancery in Washington county, in 1858. The time allowed for the redemption of the premises having expired without payment of the decree, a writ of possession was issued upon the said decree, and the said Wentworth S. Butler was put in possession of the premises included in said decree, under and by virtue of the said writ, on the 3rd June, 1859.

The Chancellor rendered a decree of foreclosure against the defendants including the six acre piece on which the mill was situated. The Chancellor also held that the steam engine, boilers and saw frames in the mill were chattels and not fixtures, and therefore passed to the defendant by his levy already mentioned,

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and that the orator had no claim thereto under his mortgage. From this decree the orator appealed.

From this statement of the case, it is apparent that this defendant, as a levying creditor of the *Roxbury Verd Antique Marble Company*, must stand upon the right which that company had to the property in controversy at the time of his attachment. We have not regarded it as our duty to consider the various objections which have been urged on the part of the defendant in respect to the defective execution of the mortgage deed to Josiah W. Butler, because no copy of that instrument has been furnished to us, and for the further reason that the deed from Josiah W. Butler to the *Verd Antique Marble Company*, under or through which the title asserted by the defendant must be derived, expressly subjects the six acres piece, upon which the property in controversy is situated, to that mortgage, and this, as against that company and all persons standing upon its right, must be taken as equivalent to a reservation of a lien on the property conveyed by the deed for the payment of the mortgage debt, and this would be just as effectual to charge the property conveyed with the incumbrance of the mortgage debt, as if it had been created by a valid mortgage deed. The only remaining question made in the case relates to the character of the engine, boilers, and saw frames,—whether they are to be regarded as fixtures, and so parcel of, or incident to, the real estate conveyed to the orator by his mortgage, or as personal chattels which were subject to the defendant's attachment and sale.

The following is a description of the property in controversy, as given by Mr. Belknap, whose testimony in this respect has been adopted by the parties as a statement of facts in relation to this part of the case :

“There are two boilers set in brick, on the outside of the main building ; the boilers are covered by a single roof running against the building under the eaves. The engine is outside of the main building, covered by a building made for that purpose. Steam conveyed to the engine by a pipe some twenty-five feet. Engine sets upon granite base, bolted to the granite by six bolts and nuts,—granite supported by a stone wall. Attached to the engine is a crank shaft, on which is a fly wheel or pulley,—one

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end of crank resting on the bed-piece of the engine, the other one on plumb block. The belting passes over the fly wheel to the main shaft. This lies horizontal over the beams. The shaft rests in iron boxes which are bolted to the beams, and upon main shaft on pulleys or drums over which belts pass to carry various machinery, to wit: six gangs of saws, horizontal saws, belting frames from main shafts to counter shafts, and crank shafts, which give the motion to the saws. These counter shafts have timbers run to the ground, and bolted with bolts and nuts to timbers a foot under ground. The shaft rests on boxes some foot and a half above ground bearings. There are five counter shafts with a pulley on each; one drives two gangs of saws.

"There are timbers bolted above the beams to the beams, and the upright pieces are attached to those timbers, put in since the building was erected, for the purpose of steadying the saws. The upright or guides to the saws are fastened to the timbers above by a bolt and nut, and extend to timbers on the ground, and fastened to them with a cast iron step, put on to the bottom of the upright to keep it from rotting, and makes a kind of tenant in the building. The saws were put in after the building was finished, and could be removed without injury to the building.

"The boiler has brick work around it, and comes to about six inches of the top. To take out the boiler would disturb the top of the brick work, but not necessarily the arches. Thickness of brick, say eight inches, except next the main building, where it is some eighteen inches; should think the boiler some four feet in diameter."

There can be no question but that the mill is a part of the realty, and that, as such, it would pass to a mortgagee, whether erected previous or subsequent to the date of the mortgage. In the recent case of *Harris v. Haynes*, 34 Vt 220, it was held that a steam engine and boilers which furnished the motive power to the machinery of a carriage shop, when annexed to the realty in a manner very similar to that in which the engine and boilers were annexed to the realty in this case, were fixtures and were to be regarded as parcel of the freehold; and, on the facts which appear in this case in respect to the engine and boilers, and the manner and purpose of their annexation to the realty.

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we are satisfied that the engine and boilers now in controversy fall within the rule of that decision, and should be treated as fixtures and a part of the realty. The rule of this decision is sustained by the uniform tenor of the American and English, cases upon the subject. 2* Smith's Leading Cases, 5th Amer. Ed., 249-51; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Richardson v. Copeland*, 6 Gray, 536; *Walmsley, et al. v. Milne*, 7 J. Scott, C. B. Rep. N. S. (97, E. C. L. R.,) 115. In *Hill v. Wentworth*, 28 Vt. 428, it is said that "whether the articles in question were personal property or fixtures, should be determinable and plainly appear from an inspection of the property itself, taking into consideration their nature, the mode and extent of their annexation, and their purpose and object, from which the intention would be indicated." In the application of this rule to the facts which appear in this case, we regard the engine and boilers as having been set up and used for the beneficial enjoyment of the mill and substantially annexed to it; and the fact that the machinery of the mill, to which the engine supplied the motive power, was so put in or set up, that it could be readily removed to any other building or quarry, cannot be considered as affecting the character of an actual and permanent annexation to the freehold. *Walmsley v. Milne*, *ubi supra*. In respect to the saw frames, we do not find in the manner in which they were fastened for use, any such annexation to the realty as would operate to change their character as chattels, and the decree of the chancellor directing that they should be considered and treated as personal property, is in accordance with the law of the subject as applied in the case of *Hill v. Wentworth*, 28 Vt. 428, and *Fullam et al. v. Stearns et al.*, 30 Vt. 443, and *Bartlett v. Wood et al.*, 32 Vt. 372.

In accordance with these views, the decree of the chancellor is reversed, and the case is to be remitted to the court of chancery, with a mandate directing a decree to be made in favor of the orator, according to the terms of the former decree, with this exception or modification, that the engine and boilers are to be declared fixtures passing with the real estate, and, as such, are to be held by the orator under his mortgage; and the orator is to be allowed his costs in this court.

Williams v. Little & Co.

ABEL S. WILLIAMS v. H. A. LITTLE & Co.

Statute of Frauds.

The plaintiff, having a demand against W., proposed to him to take in satisfaction thereof the agreement of the defendants, who were then indebted to W. in a larger sum, to pay the plaintiff a certain sum at a future time. W. thereupon requested the defendants to pay the plaintiff according to such proposition, and the defendants, in the presence of the plaintiff and W., agreed with the plaintiff so to do. *Held*, that the defendant's agreement was not within the statute of frauds.

ASSUMPSIT. The facts sufficiently appear in the opinion of the court.

The cause was tried by the court upon the plea of the general issue, at the September Term, 1861, PECK, J., presiding. The county court rendered judgment for the plaintiff, to which the defendants excepted.

J. A. Vail, for the defendants.

Geo. M. Fiske, for the plaintiff.

KELLOGG, J. The question made by the defendants in respect to the authority of Scott to act as their agent in making the agreement relied upon by the plaintiff, is disposed of by the finding of the county court, that the agreement was within the scope of the power and authority which Scott had as such agent; and the only remaining question in the case is, whether the agreement was within the statute of frauds, or not. This question should be decided by the terms and character of the agreement, and its effect as between all the parties.

The plaintiff had a claim against Samuel D. Winter, amounting to twenty-six dollars and fifty-two cents, and, about the middle of March, 1860, called upon him for payment, and proposed to him to take twenty-five dollars in satisfaction of the debt, if he would get Scott to agree, in behalf of the defendants, to pay one-half of that sum on the 1st of April following, and the other half on the 1st of July following. Winter agreed to this proposition, and both he and the plaintiff went to the office

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of the defendants, where Scott was, and Winter informed Scott of the agreement, and requested him to pay the plaintiff twelve dollars and fifty cents on the 1st of April following, and the same sum on the 1st of July following. The defendants were then owing Winter more than the amount of both sums, and he was then in their employment, and continued to work for them from that time until after the first day of the following July. Scott then, for and in behalf of the defendants, agreed with the plaintiff to pay to him the sum of twelve dollars and fifty cents on the 1st of April following, and the same sum on the 1st of July following, according to Winter's request. The whole conversation with Scott was in the presence and hearing of the plaintiff and Winter; and Scott's agreement with the plaintiff was made in the presence and hearing of Winter.

We think that the effect of this agreement was to extinguish the debt due from Winter to the plaintiff. There was a communication between all the parties, and the defendants were debtors of Winter, who was himself a debtor of the plaintiff, and, by an express agreement, the plaintiff accepted the liability of the defendants in substitution for that of Winter. The agreement for the substitution was, as between Winter and the plaintiff, an accord executed, and constituted a full defence against the original liability of Winter. In *Tatlock v. Harris*, 8 Term R. 180, BULLER, J., put this case:—"Suppose A. owes B. £100, and B. owes C. the same amount, and the three meet, and it is agreed between them that A. shall pay C. the £100., B's debt is extinguished, and C. may recover that sum against A." So in *Wilson et al. v. Copeland et al.*, 5 B & Ald. 228, (7 E. C. L. R. 77,) it was held that where the plaintiffs were creditors to T. & Co., and by consent of all parties, an arrangement was made that the defendants should pay the plaintiffs the debt due from them to T. & Co., it was held that the defendants, by acceding to this arrangement, became the debtors of the plaintiffs, and became liable for money had and received to the use of the plaintiffs. To the same effect is the case of *Heaton v. Ager*, 7 N. H. 390. A promise to pay another man's debt out of that other man's own funds, when they shall come to the hands of the person promising, is not within the

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statute of frauds. *Andrews v. Smith*, 2 Cr., M. & R. 627; *Walker v. Rostron*, 9 M. & W. 411; *Smith's Merc. Law* (3d Amer. Ed.) 574. In *Cross v. Richardson*, 30 Vt. 641, it was held that if the contract is such that it substantially transfers the debt to the promisor, either by its terms or in its legal operation, so as to discharge the original liability, then it is not a promise to pay the debt of another, but it is a promise by which the debt of another is in fact paid and that such a case does not come within the statute. In *Weston v. Jacobs*, 29 Vt. 169, REDFIELD, Ch. J., says that if the primary debtor is released, and the secondary liability is the sole debt, all the cases agree that it does not come within the statute. In *Wait v. Executor of Wait*, 28 Vt. 350, it was held that a parol promise to pay the debt of another, in consideration of property placed by the debtor in the promisor's hands, is not within the statutes, and that it was an original promise and binding on the promisor; and that, in this respect, it was immaterial whether the liability of the original debtor continues or is discharged. All the authorities agree that when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not a promise to answer for the debt of another within the statute of frauds, as no such debt exists; it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand. It is a change of interest operating by way of novation and substitution, and the original liability is by consent of all parties extinguished by the new liability upon the new and substituted contract. When the new debt is substituted for the original debt, by the mutual assent of the three parties, the original debt is discharged, and none of the parties can then recede from the arrangement. Addison on Contracts, 37, 38, 1005 *et seq.* Chitty on Contracts, (10th Amer. Ed.) 140, 147. These views lead to the conclusion that the agreement of Scott, acting as the agent and in behalf of the defendants, was not within the statute of frauds.

The judgment of the county court for the plaintiff is affirmed.

Bradish v. Bliss.

JOSEPH BRADISH v. CHESTER BLISS.

Evidence. Presumption of Innocence. Criminal Law.

If in a civil action a question arises, the determination of which involves the establishment of the fact that either party has been guilty of a criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome by a fair balance of testimony, not only the evidence introduced by the party so charged, but also the legal presumption of innocence which exists in every case.

TRESPASS ON THE FREEHOLD for burning the plaintiff's barn. Plea, the general issue, and trial by jury, at the September Term, 1861, PECK, J., presiding.

The plaintiff introduced evidence, which was all of a circumstantial character, tending to prove the issue on his part, and the defendant introduced evidence tending to prove the contrary. The whole evidence in the case tended to prove that if the defendant was guilty of the alleged trespass, he must have set fire to and burned the barn intentionally and designedly, and thereby committed the crime of arson; and it was so treated and claimed in argument by the counsel on both sides.

The court charged the jury fully in the case, and no exception was taken to the charge by the plaintiff's counsel except in the following respect: The court told the jury that it was conceded by the counsel on both sides that if the defendant was guilty, he was guilty of burning the building by design, and therefore guilty of a high crime, a crime involving moral turpitude; and that in such cases it was necessary there should be what was sometimes called full proof; that in such cases there was in the outset a presumption of innocence in favor of the defendant, and to be overcome by evidence; and that although this was a civil suit for private damages, yet, inasmuch as the act complained of was a high crime, involving moral turpitude, this presumption of innocence had its influence in the trial of the cause, and that more clear and satisfactory proof was necessary to warrant a verdict for the plaintiff than would be barely sufficient in a common suit for a debt, or a common trespass involving no crime or moral turpitude; that the case need not be made out to a certainty; that even in a criminal case it was only necessary to

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prove the guilt of the accused beyond a reasonable doubt, and that, this being a civil suit, it was not necessary that the evidence should come up to that full measure of proof that would be required in a criminal case, or if the defendant were on trial on an indictment for the crime of burning the building, when it would be necessary to make the case out beyond a reasonable doubt; that in this case a lower amount or less measure of evidence was sufficient to warrant a verdict of guilty, and yet more or stronger evidence was necessary than would be required in an ordinary civil suit for debt, or a common trespass where the defendant might be liable, and yet the act complained of not be of such a character as to amount to a crime, or involve moral turpitude,—that is, enough more to overcome the presumption of innocence; that it was for the jury, taking into consideration this presumption of innocence, to look at all the proof in the case, and if, under the circumstances, they were satisfied from the evidence that the defendant was guilty, such should be their verdict, otherwise their verdict should be for the defendant.

To the portion of the charge above detailed, the plaintiff excepted.

The jury rendered a verdict for the defendant.

Wing, Lund & Taylor and *J. A. Vail*, for the plaintiff.

Heaton & Reed and *Dillingham & Durant*, for the defendant.

POLAND, CH. J. The plaintiff claims that the court below instructed the jury substantially, that he was not entitled to recover, even if he satisfied the jury by a fair balance or preponderance of the testimony that the defendant burned his barn; that the court undertook to lay down a middle rule between that of criminal cases, where the evidence must exclude all reasonable doubt, and of ordinary civil cases, where a fair balance suffices. If this be the fair construction of what the judge told the jury, we think it was error, for the law does not recognize such intermediate rule of evidence.

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But we do not so understand the instructions excepted to, but only this, that the plaintiff in order to establish his right to a recovery against the defendant, upon his own theory of the defendant's liability, assumed to prove that the defendant had been guilty of the crime of arson, a highly penal offence; that in so doing the plaintiff assumed the burden of proving a fact, where the legal presumption was against him, that the fact did not exist, and that therefore the plaintiff must not only overcome the evidence of the defendant, by a fair balance in his favor, but also overcome this legal presumption in favor of the defendant, and against himself; that in such case not only no presumption or intendment could be made in favor of the existence of what the plaintiff attempted to prove, but the legal presumption was the other way, and therefore the fact must be found only when clearly established by the proof.

Regarding the charge as we do, we think it objectionable.

In ordinary civil cases, there is no legal presumption either way; there is nothing criminal or illegal alleged against either party; and the disputed issue is required to be established by the party upon whom the burden of proof lies, only by a fair balance of the evidence.

In many cases, sounding in tort, the defendant may be legally liable, and still be involved in no intentional wrong, and no moral turpitude, and here the plaintiff encounters no legal presumption against himself in the proof.

But the legal presumption is that men are not guilty of fraud and dishonesty, and more strongly, that they do not commit criminal offences. This presumption exists no more, when a man is on trial for a criminal offence, than at any other time, or on the trial of a civil case, when an attempt is made to show that a person has committed a crime. It exists at all times, and everywhere, and is a presumption the law ever makes. Hence every man, however charged with dishonesty or fraud, or a criminal act, is always entitled to have this presumption of the law weighed in his favor, and whoever asserts the contrary, must always encounter it, and be required to overcome it by evidence,

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This subject was much considered by the court in the case of *Briggs v. Cooper*, argued at the general term in 1861, and since decided. That was an action of slander, and the defendant set up in justification that the words were true, and that the plaintiff was guilty of the crime he had charged him with. The question arose on the trial, by what measure of evidence such justification must be established, whether by the rule of civil or criminal cases. The county court held, that the rule was the same as if the plaintiff was on trial for the offence alleged. On exceptions by the defendant, this court reversed the judgment, holding that the rule was that of civil issues, and that the presumption of the innocence of the plaintiff was a matter to be weighed in his favor, and to be overcome by the defendant's evidence. It was considered, that there was no difference between a justification in slander, and any other civil case, where the plaintiff's cause of action, or the defendant's ground of defence, was to be supported by proving that the other party had committed a crime, and that the stricter rule applied to criminal trials was on account of the penal consequences of a conviction.

The reasons for that judgment will doubtless be reported by the judge selected to pronounce the opinion of the court, and I will not go more fully into them.

Judgment affirmed.

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THOMAS HUTCHINSON v. SIMON WHEELER.

Slander. Evidence.

In an action of slander for imputing a crime, the defendant may give in evidence under the general issue, in mitigation of damages, such facts as tend to show that at the time of speaking the words he believed they were true and that he spoke them in good faith. But such facts are not admissible for that purpose under such plea, if they amount to proof of the actual truth of the words charged.

In an action of slander for charging the plaintiff with poisoning the defendant's cow, *held*, that under the general issue it was competent for the defendant to show in mitigation of damages, as tending to prove his belief in the truth of the words charged, that his cow had been poisoned; that for some time previous to the loss of the cow, there had been a bitter hostile feeling on the part of the plaintiff towards the defendant; that the defendant having at a former period poisoned the plaintiff's dog, the plaintiff had several times threatened to pay the defendant in his own coin; that the defendant had attempted to instigate a malicious prosecution against the plaintiff; and that shortly before the plaintiff's cow was poisoned, a new quarrel had broken out between the parties.

Where a witness on the part of the plaintiff was enquired of on cross-examination, if the plaintiff had not assisted him in a law suit which the witness had had with the defendant, and the witness answered in the negative, *held* that it was competent for the defendant to contradict the witness in this respect by other testimony, with a view of discrediting the witness.

This was an action for slander. Plea—the general issue, and trial by jury, at the March Term, 1861, PECK, J., presiding.

The plaintiff on trial introduced evidence tending to show the speaking of the words set forth in the declaration, and that they were spoken in the sense and meaning attributed to them in the declaration, and tending to prove all the facts necessary to entitle the plaintiff to recover on these counts. The substance of the slander charged in the declaration, was that the defendant poisoned the plaintiff's cow, and thereby caused her death.

The defendant then offered to show that just before speaking the alleged slander he had a cow die suddenly by some active mineral poison, and that she was poisoned by some person by design for the purpose of injuring the defendant; and also to show such facts and circumstances tending to implicate the plain-

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tiff as the person who administered the poison, which facts and circumstances came to the defendant's knowledge before the speaking of the words charged, as furnished probable cause and good reason for belief on the part of the defendant, at the time of speaking the words, that the plaintiff was the person who intentionally poisoned the cow; and that the defendant in good faith did then believe that to be the fact; and that at the time of speaking the words, the defendant believed them to be true. This evidence was offered, not as a defence to the action, nor to show that the plaintiff was in fact guilty of what the defendant had charged him with, but as evidence in mitigation of damages.

The plaintiff objected to the admission of this evidence, (which, so far as it tended to implicate the plaintiff as the guilty person, was of a circumstantial character). The court overruled the objection and admitted the evidence for the purpose for which it was offered, to which the plaintiff excepted.

This testimony consisted mainly in the fact that for some three years next before the defendant lost his cow, there had existed a violent quarrel between the parties, and a bitter feeling of hostility and various threats on the part of the plaintiff towards the defendant, which continued down to the time the defendant lost his cow and to the speaking of the alleged slander by the defendant.

One piece of this testimony introduced by the defendant was that about three years before the speaking of the words, the plaintiff at a certain justice trial in which the defendant was sued by some one (not this plaintiff) for poisoning a dog, the plaintiff declared to several persons that he would pay the defendant in his own coin; and to explain it, the evidence tended to show that the defendant was a tanner, and carried on that business in the neighborhood where the parties resided, in Worcester; and that the dogs in the neighborhood were doing damage to his hides about the tannery; and that he proclaimed that, unless the dogs were kept away, he should poison them; and that soon after that he did kill several of the neighbors' dogs by poison, and among them a dog belonging to this plaintiff, and one belonging to the plaintiff in that justice suit; that the plaintiff in this action attended that justice trial, and immediately after the jury returned their verdict in that action, this plaintiff

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declared to a number of persons present, that the defendant need not feel so well about the result of that suit, that he (this plaintiff) should pay the defendant in his own coin, if he lived long enough. This was objected to by the plaintiff, but admitted by the court.

Another piece of this testimony was that some time after this justice court and before the plaintiff lost his cow, the plaintiff and the defendant met in the street, and that the plaintiff told the defendant he must pay him (the plaintiff) for his dog; and after some altercation about the defendant's having poisoned the plaintiff's dog, the defendant told the plaintiff he would pay him for the dog if he would pay the damage the dog had done him; the plaintiff claimed that he had not done any damage, and said that if the defendant would not pay him for the dog, he would pay the defendant for killing him; that the defendant said the plaintiff might poison his dog any time he found him troubling him about his premises, and that he would find no fault; and that the plaintiff replied he would not poison his dog—he was not of consequence enough.

The evidence also tended to show (which was admitted under objection by the plaintiff's counsel.) that some infamous or vulgar story had been circulated about the defendant's wife, and that the defendant, a few days before the cow died, traced the origin of it in part to the plaintiff's wife; and that he charged her with it, which was known to the plaintiff just before the cow died; and the defendant, who was a witness, testified that when the cow was poisoned, and when he spoke the words charging the plaintiff with having done it, he supposed that this difficulty about this story was one reason that induced the plaintiff to retaliate by poisoning his cow; and that when he spoke the words complained of, he believed from the threats and declarations the plaintiff had made, that had before that time come to his knowledge, and the other circumstances in evidence that had before been communicated to him, and the hostile feeling the plaintiff had towards him, that the plaintiff did wilfully poison his cow.

The defendant also, in connection with the other evidence on this point, introduced evidence (which was objected to by the

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plaintiff) tending to show that during this time, a year or more before the cow died, the plaintiff endeavored to get the defendant prosecuted criminally for letting the filth from his tannery into the stream which run through a back pasture of the plaintiff's, about 60 rods from the road, and the same distance from the plaintiff's buildings where he resided, claiming that it created a stench in his pasture which was offensive—when in fact the defendant did not let it into the stream except a little occasionally in the winter, but buried it in the earth, and let the neighbors have it who drew it off for manure; and that there was no pretence or probable cause for such prosecution, claiming that it was done by the plaintiff merely from malicious motives; and that this was known to the defendant before his cow died.

The evidence on the part of the plaintiff tended to show that the filth from the tannery did float down and lodge on the plaintiff's land near the banks of the stream, and create at times an offensive smell in his pasture.

The court told the jury in relation to this testimony in reference to the efforts of the plaintiff to get the defendant prosecuted, that they should reject it entirely unless they found that there was no probable cause for such prosecution, and such a total absence of any ground for it as to satisfy them that it was attempted by the plaintiff solely from malice towards the defendant, and then it could have no effect only to show the hostile feeling on the part of the plaintiff towards the defendant, and that such hostile feeling was in no way material in the case any further than the jury thought that, if known to the defendant previous to speaking the words, it might have a tendency, with the other evidence in the case, to induce the defendant to believe, at the time he spoke the words, that the plaintiff did wilfully poison his cow.

The plaintiff introduced one Kelley as a witness, whose testimony tended to prove facts material to the plaintiff's case; and on cross examination, his testimony tended to prove that he was unfriendly to the defendant, and had had a law-suit with him, having sued him and had a justice trial. He was inquired of in reference to his relations and intimate and friendly feelings towards the plaintiff, and whether the plaintiff had not advised, aided

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and assisted him in his suit against the defendant, which Kelley denied, saying that that suit was after the speaking of the slanderous words by the defendant. The cross examination of Kelley tended to show that he had been somewhat officious in aiding in this suit on the part of the plaintiff.

The defendant induced one Templeton as a witness, with a view to affect the credit due to Kelley's testimony. Templeton's testimony was in substance that he was present at the trial between Kelley and the plaintiff, and that he was requested by the plaintiff and Kelley (who were also present,) to assist Kelley in the trial, and did so; that the plaintiff was busy looking up witnesses for Kelley, and advising and proposing questions for Kelley's counsel; that after the decision, the plaintiff and Kelley and the witness Templeton were present advising with Kelley's counsel about an appeal. This evidence was objected to by the plaintiff, but admitted by the court for the purpose above stated.

The court instructed the jury as to the law applicable to the merits of the case, touching the right of the plaintiff to recover, and generally as to the law applicable to the rule of damages, to the satisfaction of the plaintiff's counsel, and to which no exception was taken by the plaintiff's counsel except as to the effect the court gave to the evidence in mitigation of damages. But on the subject of damages, the plaintiff's counsel requested the court to instruct the jury that they should lay out of the case all the evidence (above stated) introduced in mitigation of damages, and that it had no tendency to mitigate the damages. The court refused so to charge, but in reference to that evidence, after referring to it, told the jury that, as the court had already told them on another branch of the case, it must be taken in this case, that the plaintiff was, in fact, innocent of the crime or charge imputed to him by the slanderous words set forth in the declaration; that the defendant could not rely on the truth of the words spoken by him without pleading it specially, and thereby giving the plaintiff notice that he intended to rely on it, which in this case he had not done; that in actions of this character the jury had a right to give exemplary damages, that is, damages over and above what the plaintiff had really sustained; that if the defendant

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was actuated, in speaking the words for which the plaintiff seeks to recover, by actual malice or malignity of feeling, and spoke them for the purpose of injuring the plaintiff's reputation, it tended to aggravate the damages. And, on the other hand, if, at the time of speaking the words, he honestly supposed what he said was true, it tended to mitigate the damages below what they should be if he maliciously invented the slander without any belief in its truth, or reasonable ground of such belief; and it was in this view only that that evidence was admitted and to be considered; that the question was not so much whether the plaintiff was, in fact, guilty of the charge or crime imputed to him by the defendant, as whether the defendant had reason to believe, and did believe he was guilty at the time he spoke the words complained of; that if the jury thought that the defendant had not sufficient ground for such belief, yet, if the defendant misjudged and did believe it, it had a tendency, to some extent, to mitigate the damages; still this evidence furnished no reason why the plaintiff should not recover all the actual damages he had sustained, but would go in mitigation of exemplary damages; that notwithstanding this evidence, the plaintiff, if he recovered, was entitled to recover a just and reasonable compensation for the injury he had sustained, and such damages as the jury should think, under all the circumstances, was right, and would do substantial justice between the parties; what would be a just compensation to the plaintiff, and a just punishment to the defendant.

The jury returned a verdict for the plaintiff.

The plaintiff excepted to the foregoing rulings of the court, and to the refusal of the court to charge as requested, and to the portion of the charge above given.

Wing, Lund and Taylor, for the plaintiff.

Peck & Colby, for the defendant.

POLAND, CH. J. In an action of slander, for words imputing a crime to the plaintiff, on proving that the defendant spoke the words constituting the charge, the plaintiff is entitled to recover,

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unless the defendant interpose some ground of justification by plea, and support it by proof.

The plaintiff is not bound to give any proof of malice in the defendant; the law implies malice from the speaking, sufficient to maintain the action. The action, however, proceeds on the ground of malicious speaking, and malice is one of the most important and essential elements of the defendant's liability. The plaintiff may, for the purpose of enhancing his right to recover damages against the defendant, give in evidence almost any facts tending to prove that he was in fact actuated by malicious motives in speaking the words. So, on the other hand, the defendant may give in evidence facts and circumstances, to rebut the proof or presumption of malice, and thereby lessen or mitigate the damages. He can not justify the speaking, by proving the truth of the charge, or in any other way, under the general issue, as such defence must always be specially pleaded; but he may, under the general issue, give in evidence any facts that tend properly to show that he did not speak the words wantonly and maliciously, for the purpose of injury to the character of the plaintiff. One of the grounds on which a defendant in such action may disprove malice, and so mitigate the damages, is by proof of such facts and circumstances as show that he had reason to believe, and did believe, when he spoke the words, that they were true, and that therefore he acted *bona fide*, and not wantonly and maliciously, when he spoke them. This general proposition is not denied in any of the cases on this subject, but many cases, especially in New York, add to this a qualification, that such facts and circumstances must not be such as tend to prove the truth, or would form links in a chain of evidence to establish a justification. It is certainly difficult to see what facts or circumstances could exist, that could justify one in believing or suspecting that another had committed a crime, when such facts and circumstances had no tendency to prove it, and could not be used even as links in a chain of evidence to establish it. There is a very great conflict of decision in the cases on this subject, and the decisions are numerous where this qualification has been wholly rejected.

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We are not aware that the question has ever been decided in this state, and we therefore are at liberty to adopt such rule as we deem best founded in reason, and most consonant to general legal principles.

In *Williams v. Minc*, 18 Conn. 463, this question arose, and the whole subject is most thoroughly discussed, and all the cases, English and American, examined by CHURCH, CH. J. The principle established by that case is thus stated: "In an action of slander the defendant, under the general issue, without notice of special matter of defence or justification, may prove, to repel the presumption of malice, and in mitigation of damages, facts and circumstances showing a reasonable ground of belief in the defendant of the truth of the words, but not amounting to proof of their actual truth."

We are best satisfied with the rule there laid down, as one founded in good reason, and running counter to no other established rule of law.

The defendant introducing such proof is not allowed to introduce it as evidence of the truth of the charge, nor to claim for it, or argue from it, that the charge is true, or probably true, but only that he was thereby induced to believe that what he said was true, and therefore spoke the words in good faith. Nor can a defendant in such a case go into evidence that really proves the charge to be true, under pretence of mitigating the damages, he must concede that his evidence does not support it.

The evidence offered by the defendant and admitted in this case, against the objection of the plaintiff, was in substance this,—that the defendant's cow had been poisoned by some one; that for a period of some three years, there had been a violent quarrel between the plaintiff and the defendant, and a bitter feeling of hostility on the part of the plaintiff towards the defendant; that two or three years before this, and after the defendant had poisoned the plaintiff's dog, and some others, that had damaged hides in his tannery, the plaintiff threatened that he would pay the defendant in his own coin, and repeated this in substance at different times; that about a year before this time, the plaintiff, without any just cause, had attempted to get a criminal prosecution instituted against the defendant; and that a few days

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before the loss of the cow by the defendant, a new quarrel had broken out between the parties, growing out of some slanderous story in relation to the defendant's wife, which he claimed had been circulated by the plaintiff's wife.

This evidence is first objected to, on the ground that these facts, if true, would tend to prove the truth of the words, or at least that they would, or might, form links in a chain of evidence to prove the truth of them.

It must be conceded, that if the defendant had pleaded in justification that the words were true, or if the plaintiff had been indicted for the offence imputed, some of these facts would have been, not only admissible, but necessary evidence. It would have been necessary to prove that the defendant's cow was poisoned. This would have to be proved, in order to show that the crime had been committed. By itself, it no more proved that it was committed by the plaintiff than by any other person; it would be a fact necessary to be proved in a prosecution against any one. So it would be admissible to prove that a quarrel existed between the parties, in order to show a motive on the part of the plaintiff to commit the crime; and the evidence that the plaintiff had made threats against the defendant, would have a still stronger effect against the plaintiff. But if the evidence of all these facts was satisfactory, it would all fall quite short of establishing proof of the offence, and therefore, as already stated, is not open to the objection that the defendant was really proving a justification under the general issue.

At the same time we think these facts might have had, and naturally would have, an effect upon the mind of the defendant, to induce him to believe that the plaintiff had done him the injury he had suffered. Some one had secretly poisoned his cow. The first impulse of his mind would be, that it was done by an enemy. It was a crime that could have been committed from no motive of interest or advantage to the perpetrator, but only to do damage to the owner. The facts admitted in evidence tended to show that a bitter feeling had existed between the parties for a long time; the plaintiff had threatened revenge; he had wrongfully attempted to get the defendant prosecuted; and a new and fresh cause of quarrel had just broken out between them. Was it not

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perfectly natural and legitimate that the defendant's conclusion would be, that the injury he had suffered was caused by the plaintiff, without further ground of belief, even though these facts alone would furnish no sufficient legal evidence of the fact?

In our judgment they would naturally have this effect, and were therefore admissible in evidence, as tending to show that when the defendant made the charge, he made it in good faith, supposing he had sufficient reason to believe it to be true.

It is also objected that if it were admissible to prove that a state of hostility and ill feeling existed between the parties, only general evidence should have been admitted, and not evidence of particular facts. But it is often difficult in such cases to ascertain the true state of feeling, and the extent and intensity of hostile feeling, between parties, by mere general evidence, and it must depend much upon the circumstances of each particular case, how far it is necessary to allow such evidence to go into detail, to show it, and much must be left in this regard to the discretion of the judge conducting the trial, to get the matter fairly before the jury.

It is also objected that by this course of proceeding, evidence may be introduced relative to many different transactions, of which the plaintiff has no notice from the pleadings, and therefore may not be prepared to meet and rebut them with his proofs. But we do not apprehend any great practical difficulty on this subject, no greater at least than may arise in any case where any other class of facts and circumstances may be relied on to rebut the presumption of malice. In this class of cases, involving questions of character, a wide range is usually taken, and generally no great danger of surprise by the introduction of proof of which the other party is not apprised. If, however, a party is really taken by surprise, the court before whom the suit is tried will take care that the party is not prejudiced thereby. The objection, we think, is more fanciful than real.

The evidence objected to, we think, was properly admitted for the purpose for which it was offered, and the charge of the court upon it, and its effect, was entirely correct. The objections to the charge are in substance the same as those made to the evidence itself, which are not tenable.

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The remaining objection is to the admission of the evidence of Templeton to contradict the plaintiff's witness, Kelly.

Kelly on his cross examination had been enquired of as to the relations between him and the parties, as to his friendship to the plaintiff, and hostility to the defendant, and particularly if the plaintiff had not aided and assisted him in a law suit against the defendant. This he denied. Templeton was called by the defendant to contradict him in this particular. It is objected that the inquiry to Kelly was wholly collateral, and that therefore the defendant was bound by Kelly's answer. ^Y It is always admissible for the purpose of affecting the credibility of a witness to prove his friendly relations to the party calling him, and hostility to the party against whom he testifies, or that his interest is in favor of the one, and against the other, and it has never been supposed, that a party by enquiring as to these matters on cross examination of the witness, was precluded from proving the contrary if he could. ^X Such enquiries are not collateral, so that the party is bound by the witness' answer. The common case of asking a witness on cross examination, if he has not stated differently from what he testifies, stands on the same principle, and here the settled rule of practice requires the witness to be first enquired of. It would be very novel, that a witness who should deny on cross examination that he was interested for the party calling him, or that he was hostile to, or had made threats against, the other, could not be contradicted. The settled practice has been the other way. The case of *Stevens v. Beach*, 12 Vt. 583, cited by the plaintiff to support this objection, was wholly a different question; the question put and answered on cross examination was purely and strictly collateral.

The judgment is affirmed.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF LAMOILLE,

AT THE

AUGUST TERM, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. LOYAL C. KELLOGG, } ASSISTANT JUDGES.
HON. ASHHEL PECK, }

McFarland v. Wilbur et al.

MOSES MCFARLAND v. S. L. WILBUR AND H. N. LEACH.

Scire facias. Bail on Mesne Process. Arrest. Soldiers.

In *scire facias* against bail on *mesne process*, held to be a good plea on general demurrer, that the plaintiff promised the bail before the return day of the writ in the original action, that if they would cause their principal to attend the trial of the cause against him, they should be discharged as bail, and that, in reliance upon such promise, they did procure him to attend at such trial.

In *scire facias* against the bail of one arrested on *mesne process* in a civil action, held, that the defendants were discharged from liability by the fact that their principal had, during the pendency of the action against him, caused himself to be enrolled as a soldier for service under the government of the United States, and had ever since continued under orders for service under the authority of the United States.

The act of 1861, (Acts of extra session of 1861, No. 8, p. 186,) which was passed subsequent to the arrest of the principal in such case upon *mesne process*, having conferred upon him a privilege from arrest, his surrender by his bail would have been of no use to the creditor, and the bail are therefore not liable in *scire facias* for not surrendering him.

SCIRE FACIAS against the defendant as bail on *mesne process* for one Elbridge Wilbur, who was arrested on the 1st of April, 1861, upon a writ in the plaintiff's favor against him, in an action on the case, returnable before a justice of the peace, upon which writ the defendants, on the day of Wilbur's arrest, endorsed their names as his bail. The declaration duly set forth the arrest of Elbridge Wilbur on such writ, and the act of the defendants in becoming his bail, the rendition of a judgment in favor of the plaintiff in such action, both by the justice of the peace and by the county court to which Elbridge Wilbur carried the case by appeal, the issue of an execution upon such judgment of the county court, and its seasonable delivery to an officer, and the making of a *non est inventus* return thereon by the officer.

The defendant pleaded seven pleas, the first five of which set forth substantially, but each in slightly variant terms, that after they became bail for Elbridge Wilbur, and before the return day of the writ, the plaintiff promised, in consideration, that the

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defendants would forbear to take and secure the body of Elbridge Wilbur, for the purpose of surrendering him at the justice court in discharge of themselves as bail, and would cause said Elbridge to appear personally and attend such court, that such acts should be a full discharge of the defendants' liability as bail for Elbridge Wilbur; and also that the defendants, relying on the plaintiff's promise, forbore to take and secure the body of said Elbridge for the purpose of surrendering him at the justice court, and that they caused him to appear at the trial of the cause before the justice.

The sixth and seventh pleas alleged substantially, that during the pendency of the plaintiff's action against Elbridge Wilbur, viz., on the 20th of May, 1861, the said Elbridge Wilbur enrolled himself as one of the volunteer militia of the state of Vermont, for service under the government of the United States, and that ever since that time he had been under orders for service under the authority of the United States, and therefore privileged from arrest and imprisonment upon civil process.

To all these pleas the plaintiff demurred generally.

The county court, at the May Term, 1862, PIERPOINT, J., presiding, adjudged the pleas insufficient, and rendered judgment for the plaintiff, to which the defendants excepted.

G. W. Hendee and L. F. Wilbur, for the defendants.

Powers & Glead, for the plaintiff.

POLAND, CH. J. The first five pleas of the defendants allege in substance, that after they became bail for Elbridge Wilbur, and before the return day of the writ, in consideration that the defendants would forbear to take and secure the body of the said Elbridge Wilbur, for the purpose of surrendering him at the justice court, in discharge of themselves as bail, and would cause the said Elbridge to appear personally and attend said court, the plaintiff promised that such acts should be a full discharge of their liability as bail for the said Elbridge; and the pleas allege that relying on the plaintiff's promise, the defendants did forbear to take and secure the body of the said

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Elbridge, for the purpose of surrendering him at the said justice court, and that they did cause the said Elbridge Wilbur to appear at the hearing and trial of the plaintiff's suit before the justice.

It is not alleged in these pleas that the defendants had procured a bail piece, upon which to take the said Elbridge, or that they designed, or were about, to procure one, or that they were entitled to one; nor is it alleged that they had taken, or intended to take, the said Elbridge into custody, for the purpose of surrendering him at the justice court. All this must be inferred, (if found at all in the pleas,) from the allegation that the defendants forbore to take him into custody for the purpose of surrendering him, relying upon the plaintiff's promise. In *Van Ness v. Fairchild*, 1 D. Chip. 163, a plea of a similar character was held defective, for want of the special and particular averments, which are wanting in these pleas.

We have not found it necessary in this case to examine critically, whether the want of these averments in terms, can be supplied by inference from what is alleged, so as to render them sufficient against a general demurrer.

The pleas allege as one consideration for the plaintiff's promise to release the defendants as bail, that the defendants would cause the said Elbridge Wilbur, their principal, to attend the trial of the plaintiff's case before the justice, and that the defendants did cause him to attend. This clearly was an undertaking to which they were not bound by becoming bail for him upon the plaintiff's writ. Their liability as bail was merely that their principal should remain within the precinct of the proper officer, so that he could be taken, when wanted upon the plaintiff's execution.

His failure to attend the trial, and allowing the plaintiff to take a judgment against him by default, fixes the bail with no liability, provided he remains within reach of the plaintiff's execution. It might be a benefit to the plaintiff to have the defendant present at the trial; he might desire his testimony to establish his cause of action, or to show the extent of his damages, or to show that the cause of action was of a nature to entitle him to a certified execution. It might be an inconven-

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ience and damage to the defendants to procure the attendance of their principal at the justice court; at any rate, it was an act they were under no obligation to perform, and if, in consideration of the defendants' undertaking, and performing it, the plaintiff promised to discharge them from their liability as bail, we think it was a valid and sufficient consideration.

Upon this ground, we are of opinion that these pleas show a good answer to the plaintiff's declaration.

The sixth and seventh pleas of the defendants present a question of more general importance.

These pleas allege, that while the plaintiff's action was pending against Elbridge Wilbur, to wit, on the 20th day of May, 1861, the said Elbridge Wilbur was enrolled as one of the volunteer militia in the state of Vermont, for service under the government of the United States, and that ever since the said 20th day of May, 1861, the said Elbridge Wilbur has been under orders for service under the authority of the United States, and therefore privileged from arrest and imprisonment upon civil process.

It has not been questioned by the plaintiff's counsel, and we think can not be successfully, that the act of the extra session of 1861 extends to a case like this, and that if the plaintiff had taken the body of Elbridge Wilbur in execution, he would have been entitled to an immediate discharge, even though previously held to bail upon the writ.

But the plaintiff insists, that this furnishes no defence to the bail in this action against them; that if they could have been relieved at all, it was only by an application in the original action, and that having neglected to make it there, they must now either produce the body of the principal, or pay the plaintiff's judgment.

The plaintiff relies entirely upon two cases in Massachusetts, *Sayward v. Conant*, 11 Mass. 146, and *Harrington v. Dennie*, 13 Mass. 92, to support this proposition.

In the former case, no reasons are given for the decision, but in the latter the opinion was given by Chief Justice PARKER.

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It was distinctly held, however, in both cases, that a voluntary enlistment of the principal into the service of the United States, after his arrest, and before the bail became fixed, was no defence to a *scire facias* against the bail.

The case is put distinctly upon the ground, that the principal could not by his own voluntary act, put himself in a position to deprive the plaintiff of the benefit of the bail contract, either against himself or his surety.

The general principle seems to be fully recognized, that whatever would render the arrest unlawful, or insufficient by operation of law, would operate to discharge the bail; and that it might be shown by the bail as a defence to the *scire facias*. There is certainly some show of reason in saying that a man who has been arrested and given bail, shall not by his own voluntary act deprive the plaintiff of the security he has thus obtained.

But to hold that he may by his own voluntary act deprive the plaintiff of any right to arrest and imprison him, and that this furnishes no reason for absolving his bail, (who had no knowledge of, and gave no assent to, his enlistment,) from the penalty of the contract, for not producing the principal to be arrested and imprisoned upon the execution, seems not only unjust but absurd. The Massachusetts court seem not to have fallen into this dilemma, for by a note to *Harrington v. Dennis*, it appears that after the court decided that these facts furnished no defence to the bail, he surrendered the principal, who moved to be discharged from custody, and the court refused to discharge him.

It does not appear from the case upon what ground the court refused to discharge, but it is quite clear that if the principal was not entitled to be discharged, when surrendered, the same facts could not furnish a defence to the bail for not surrendering him.

The principle seems now to be quite generally settled, both in England and in the American States, that bail need not surrender their principal, when such surrender would be useless to the creditor, because he can not proceed to enforce his

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claim by the imprisonment of the principal. This has been fully adopted in this state, by the cases of *Aiken v. Richardson*, 15 Vt. 500, and *Bellmap v. Davis*, 21 Vt. 409. In the former of these cases, ROYCE, CH. J., says: "Courts are at liberty to consider the effect of surrendering the principal, and, if they perceive that it could be of no benefit to the creditor, they will not require it, but release the bail. This happens when the surrender can not legally be followed by further proceedings against the body of the principal." He cites a large number of cases, both English and American, in support of the position.

There has been some conflict in the rule of practice, as to when, and how, the bail must take advantage of such defence, whether by application, in the original action, to be discharged, or by way of defence to a *scire facias*. In England it has been required to be by application in the original suit, where the arrest was legal in the outset; and this rule has been followed in some of the states.

But in this state, as in Massachusetts and some others, it is now settled, that wherever the bail are entitled to be discharged in the original action, the same facts may be pleaded as a bar to a *scire facias*. See *Aiken v. Richardson*, and *Bellmap v. Davis*, *ubi supra*.

The case of *Robinson v. Patterson*, 7 East 405, seems quite in point to the present action. That was an application to have an *exoneratur* entered as to the defendant's bail, on the ground that after arrest, and giving bail, and before the bail were fixed, the defendant was impressed into his Majesty's service as a seaman, and as such was not liable to arrest on the plaintiff's debt. The plaintiff answered this, by showing that after the defendant's impressment, he agreed to enter the service, and accepted a bounty as a volunteer. The court in the first place refused to grant a *habeas corpus* to enable the bail to bring in the body of the defendant to surrender him, but ordered an *exoneratur* of the bail to be entered, as the surrender of the principal would be of no avail to the plaintiff, as the defendant would be entitled to an immediate discharge, if surrendered.

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In this class of cases, in whatever form they have arisen, it has generally been said, that if the surrender of the principal become impossible by act of God, or unlawful by statute, or by operation of law, it will entitle the bail to a discharge, or be a defence to the bail when sued, according as the rules of different courts have allowed the defence to be made.

Among the cases where it has been held that the surrender of the principal has become impossible by operation of law, so as to excuse the bail from making a surrender, are those where the principal has been convicted and transported for felony; where the principal has been made a peer, or been elected a member of the House of Commons. It is difficult to see in these cases, why the exemption of the principal from arrest, does not arise more from the voluntary act of the principal, than by operation of law.

So too, it has been everywhere held, that a discharge of the principal, under the bankrupt law, is a good defence for his bail. This was decided in this state in *Bellnap v. Davis*, before cited. In a case of voluntary bankruptcy, under a bankrupt law, like the latest one in this country, it is not apparent, why such discharge does not arise from the voluntary act of the bankrupt himself. Yet in all these cases, this consideration has not been deemed sufficient to deprive the bail of the defence.

It is worthy of notice, that the act of the extra session, under which the arrest and imprisonment of volunteers in the militia in the United States service, on civil process, was prohibited, was passed after the bail contract was entered into by the defendants, and before the plaintiff obtained his judgment, and issued his execution. In this respect the case differs from those in Massachusetts. If this makes no real difference between them, we think those cases are not supported by sound principle, and we can not follow them.

It seems to us that the whole question hinges upon this: if the defendants had surrendered their principal, could the plaintiff legally have held his body till he satisfied his debt, or would he have been entitled to an immediate discharge, so that such surrender would have been wholly unavailing to the creditor?

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As before stated, the plaintiff does not claim he could legally have held the body of the principal, if surrendered to be taken in execution by him, and any other construction would render the act of the legislature a mere nullity. We are therefore of opinion that these pleas also furnish a good answer to the plaintiff's suit.

The judgment of the county court is therefore reversed, and judgment rendered for the defendants.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CALEDONIA,

AT THE

AUGUST TERM, 1862,

PRESENT:

HON. ASA O. ALDIS,	} ASSISTANT JUDGES.
HON. JOHN PIERPOINT,	
HON. LOYAL C. KELLOGG,	
HON. ASHHEL PECK,	

Saulters v. Town of Victory.

WILLIAM SAULTERS v. THE TOWN OF VICTORY.*Towns. Constable. Taxes. Damages.*

The measure of damages in an action against a town by the purchaser of land sold by the constable for taxes, to recover for the constable's neglect in his proceedings, in consequence of which no valid title was conveyed by his deed, is the amount of money paid by the purchaser for the deed, with interest.

CASE to recover damages for the default of S. C. Kendall, constable and collector of taxes of the town of Victory, in his proceedings in selling lot No. 2 in the 1st range in said town of Victory, to the plaintiff. Plea, the general issue, and trial by the court, at the August Term, 1861. The following facts appeared at the trial.

On the 3d of October 1855, Peter Burbank deeded to Timothy C. Skeele the lot in question. Skeele deeded to John Beckwith January 10, 1857; Beckwith deeded to Edgar Richardson February 27, 1855, and Richardson deeded to the plaintiff, February 28, 1855.

There was no evidence of any title to said lot in Peter Burbank, and the lot was wholly unoccupied and uncultivated. After this lot was thus deeded to the plaintiff, it was set to him in the list of Victory, but it did not appear whether he had ever paid any taxes upon it. In 1858 taxes were assessed upon this lot to the amount of \$1.55, and the same not being paid, S. C. Kendall, the constable of Victory for that year, advertised and sold this lot, with other non-resident lands in town, for the taxes and costs.

The plaintiff became the purchaser at such constable's sale, and the whole lot was sold to him for the tax and costs, amounting in all to \$1.86, which the plaintiff paid.

The lot was not redeemed by any person, and on the 7th day of January, 1860, Kendall, as collector, deeded the lot to the plaintiff.

The collector's proceedings in advertising and selling said lands were admitted in evidence, but the same were defective and irregular, and the court held the same illegal and void so that no valid title was conveyed to the plaintiff by the collector's deed,

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It was also proved that on the 20th of July, 1830, John W. Chandler, as administrator of James Whitelaw, conveyed said lot to Oliver P. Chandler, who deeded it to Charles Burpee on the 10th of January, 1859. There was no evidence of any title to said lot in Whitelaw, or either of the Chandlers. In the winter of 1850, after the plaintiff received his deed from the collector, the plaintiff went upon the lot and there found Charles Burpee and others cutting timber thereon, and, being forbidden by the plaintiff to cut the timber, Burpee claimed to be the owner of the lot under his deed from Chandler, and declared that he should continue to get off the timber from the lot. There was no other evidence of title or possession of the lot in any person than is above stated.

The plaintiff gave evidence tending to prove that the lot was worth from three to four hundred dollars, and claimed to recover the value of the lot. But the court held that the plaintiff was not entitled to recover the value of the lot, but only so much as he paid the collector and the interest thereon, and rendered judgment for the plaintiff accordingly, to which the plaintiff excepted.

G. O. Cahoon, for the plaintiff.

Bliss N. Davis, for the defendant.

KELLOGG, J. This is an action on the case, under the statute, (Comp. Stat., p. 116, § 29,) against the town of Victory, to recover damages for the neglect and default of its constable and collector of taxes in his proceedings in selling a lot of land in that town to the plaintiff, for taxes assessed thereon, in consequence of which no valid title was conveyed to the plaintiff under the sale. The plaintiff gave evidence tending to show that the lot was worth three or four hundred dollars, and claimed to recover the value of the lot of the town, as damages, but the county court held that he was entitled to recover only the amount paid by him to the collector on the sale, which was one dollar and eighty-six cents, with the interest thereon.

It is made the duty of the town, by the statute, to make good to the plaintiff all damages which have accrued to him by reason

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of the collector's neglect. The plaintiff claims the same measure of damages in this case to which he would have been entitled in an action against one who had conveyed to him the lot with a covenant of warranty upon a total failure of title, and a subsequent eviction. It is to be remembered that this is not an action on the covenants of the deed which the collector executed to the plaintiff, nor is it an action against the collector for his neglect or default. In an action of covenant upon any of the covenants of title in a deed of conveyance except the covenant of warranty, the ordinary measure of damages is the consideration money, or the proper proportion of it, with interest. 4, Kent's Comm., 474-5; 2, Greenl. Ev., § 264; Rawle on Covenants for title, (3d Ed.,) p. 58 to 63; *Catlin v. Hurlburt*, 3 Vt. 403; *Richardson v. Dorr*, 5 Vt. 9; *Blake v. Burnham*, 29 Vt. 137. In many of the United States, the same rule of damages for a breach of the covenant of warranty prevails as in actions for a breach of the other covenants for title. Rawle, p. 312, 319-20; 4 Kent's Comm., 475. But, in this State, the rule of damages in an action on this covenant has always been the value of the land at the time of the eviction. *Adm'rs of Strong v. Shumway*, 1 D. Chip. 110; *Williams v. Wetherbee*, 2 Aik. 329; *Park v. Bates*, 12 Vt. 381; *Keeler v. Wood*, 30 Vt. 242. In the case of an action against the vendor of real estate, where he is unable to convey according to his contract, in consequence of his title proving defective, if his conduct is not tainted with fraud or bad faith, the plaintiff can only recover whatever money has been paid by him, with interest and expenses. Sedgwick on Damages, 209. The collector's deed to the plaintiff being in the form prescribed by the statute, no action can be maintained against the collector on its covenants. *Gibson v. Mussey*, 11 Vt. 212. The errors or omissions of the collector which are complained of by the plaintiff, are not in the deed, but in the previous proceedings. If those proceedings had been in all respects regular, the land might have been redeemed by the owner within one year after the sale, (Comp. Stat., p. 465, §§ 18, 19,—p. 512, §§ 5, 6,) and, in that case, all that the plaintiff could claim to have refunded to him would have been, not the value of the land, but the amount of the money paid by him with the interest. Ought he to stand

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in any better position against the town because these proceedings were irregular? He never went into possession of the land, and he has lost nothing except the money paid by him. At the time of the collector's sale and conveyance to the plaintiff, there was no existing possession or seizin of the lot by any person claiming under an elder or better adverse title, and the plaintiff's failure to obtain possession of the lot is to be attributed to his own negligence rather than to the failure of his title under the collector's deed. If he had taken possession of the lot when he received that deed, he would have had a right superior to that of Burpee, who subsequently took possession of it under a claim of title derived from another source, but in no respect better than that of the plaintiff, either in its origin or its character. Under these circumstances, the failure of the plaintiff to obtain the possession of the lot ought not to be considered as equivalent to an actual ouster or eviction, such as would be necessary to sustain an action on a covenant of warranty; and we think that the rule of damages adopted by the county court in this case was as favorable to the plaintiff as he was entitled to claim.

The judgment of the county court in favor of the plaintiff is affirmed; but, the plaintiff being the excepting party, and not prevailing on his exceptions, the defendant is allowed his costs in this court.

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FREEMAN H. ELLSWORTH v. FOGG & HARVEY.

Promissory Note. Payment.

The maker of a negotiable promissory note, which has been indorsed in blank by the payee, may rightfully pay it to, or settle it with, any person holding the same, provided he acts in good faith, and there is nothing in the circumstances tending to cause suspicion that the holder is not the rightful owner.

The acceptance by the holder of a promissory note of part of the amount due upon it, in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be cancelled, is a full discharge of the note, and no action can be maintained for the unpaid portion.

ASSUMPSIT. The writ was not served upon the defendant Fogg, and there was no appearance by him. The defendant Harvey pleaded the general issue, and the case was tried by jury, at the June Term, 1861, POLAND, CH. J., presiding.

The plaintiff claimed to recover on five notes, all dated the 28th of February, 1857, one for \$500, payable in one month, and four for \$911.75 each, payable severally in three, six, nine, and twelve months from date, with interest annually, at the Suffolk Bank, Boston, signed by Fogg & Harvey, and payable to the plaintiff or order. The plaintiff had not the notes in his possession, but had notified the defendant to produce them on the trial. In pursuance of the notice Harvey produced the notes, but insisted that they had been settled and paid, and surrendered to him, and that he was not liable thereon. The notes all bore the plaintiff's endorsement. The suit was prosecuted by, and for the benefit of, one Aiken, of Boston, Massachusetts.

It appeared by the evidence introduced by the plaintiff, that the notes were brought to Peacham, where the defendant Harvey lived, by one Shattuck, an attorney, from Manchester, New Hampshire, who claimed to have an assignment of them from the plaintiff, to secure a debt against him. Shattuck employed Mordecai Hale, Esq., to commence a suit on the notes, and some property was attached on the writ. After the suit was brought, Shattuck retained the notes in his possession, and returned to Manchester. On the 6th of January, 1859, after the suit had

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been brought, the plaintiff being indebted in quite a large sum to Aiken, and being called on for payment or security, made an assignment of these notes to him. The notes were at this time in Shattuck's hands, and Shattuck made an assignment of them from the plaintiff to Aiken, on a separate piece of paper. A son of Aiken was present at the time, acting for his father in the matter, and testified that at this time neither the plaintiff nor Shattuck said anything in relation to the notes having been previously assigned to Shattuck. He was to aid in their collection, as the attorney of Aiken.

On the 28th of December, 1859, Aiken wrote to Mr. Hale, giving him notice of the assignment of the notes to him. About the 1st of February, 1860, Shattuck came to Peacham, having the notes in his possession, and a negotiation was entered into for a settlement and compromise of the claim. The defendant Harvey represented that he had not the pecuniary ability to pay the notes, and could pay but a small part of them. In consideration of these representations, Shattuck finally consented to take eleven hundred dollars and give up the notes, and Harvey paid Shattuck the eleven hundred dollars and he surrendered the notes to Harvey, and agreed the suit should be discontinued. Mr. Hale took some part in the negotiation, and was present at the settlement, but it was mainly conducted by Shattuck. Shattuck claimed to have the full right to control and manage the notes, and it was not claimed that the defendant Harvey had any knowledge of any assignment of the notes to Aiken, or of any want of right or authority in Shattuck to control the notes. It was also proved that the plaintiff had not paid his debt to Aiken, which he assigned these notes to secure, and also that Aiken gave Shattuck no authority to make such settlement and surrender of the notes.

After the notes had been surrendered, Aiken, having learned it, gave the defendant Harvey notice of his assignment, and employed counsel to take charge of the present suit upon the notes.

The counsel for Aiken claimed that the plaintiff was entitled to recover upon the notes, firstly, because Shattuck had no right to hold or control the notes as against Aiken, and was not author-

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ized by him to make any such settlement and surrender of the notes; and, secondly, that if he had full authority to make a settlement, the payment of a part of the notes furnished no consideration for the surrender of the balance, and that the plaintiff was at least entitled to recover all but the eleven hundred dollars paid.

But the court held, and so instructed the jury, that as it was conceded that the notes were lawfully in Shattuck's possession, and that as he had them in his possession, with the plaintiff's endorsement thereon, claiming to have the legal title to them and the right to control them, and as the defendant had no knowledge to the contrary, the defendant had the right to treat and deal with him as the owner of the notes, and that if in consequence of the defendant's representations of his poverty and inability to pay the whole notes, Shattuck accepted less than the full amount of the notes and surrendered the whole notes, the balance could not be legally recovered from him, if such representations were honestly and truthfully made.

To these instructions, and the refusal of the court to charge as the plaintiff claimed, the plaintiff excepted.

The jury returned a verdict for the defendant.

Leslie & Rogers and *Peck & Colby*, for the plaintiff.

B. N. Davis and *T. P. Redfield*, for the defendant.

ALDIS, J. L. Shattuck was apparently the owner of the notes. He had claimed to have an assignment of them, and had them in his possession. The notes were negotiable, and indorsed by the payee in blank. He claimed to have the full right to manage and control the notes, and Harvey had no knowledge that any other person had any claim to them. Nor had Harvey notice of anything that should awaken suspicion, or put him on inquiry.

The fact that Shattuck was an attorney by profession—so long as he did not appear to be acting as an attorney for any other person—was not a fact to awaken suspicion, or justify a refusal to deal with him as the owner of the notes.

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As Shattuck claimed title, and had all the usual indicia of title, and nothing was known to Harvey to suggest a doubt upon that point, he was justified in dealing with Shattuck as the owner.

II. Does acceptance of a part of the amount due on a promissory note, in satisfaction and discharge of the whole note, and a surrender of the note by the owner to the maker, to be cancelled, bar a suit brought by the owner for the recovery of the unpaid portion?

We are not disposed to disturb the rule as stated in *Wheeler v. Wheeler*, in the 11th Vt., that payment of a part of a debt upon an agreement that it shall be satisfaction of the whole, even though the agreement and payment are shown by a receipt, will not extinguish the whole debt. It is claimed here that besides the part payment and the agreement, there is another element—the surrender of the notes to the maker—which operates as a complete discharge of the whole amount due upon them. Inasmuch as it is the *agreement* of the parties that gives validity and force to their contracts, and to the discharge of them; *their agreement* which courts seek to ascertain, and which, when ascertained, justice requires should be faithfully and exactly enforced, it seems plain that their *agreement* as to payment and its performance, ought to be the great and controlling considerations in determining when a debt is paid and discharged.

Nor does it seem satisfactory to one's sense of justice to be told, that, when the parties have agreed that payment of part of a debt shall discharge the whole, and one of the parties has performed by payment, the other party shall be protected in refusing to perform his part, and may collect the portion of the debt which he has agreed to discharge, because there is no consideration for the agreement.

Neither does it seem to add any thing to the good sense of this class of decisions to say, that if the payee of the debt, on accepting a part, execute a release of the rest of the debt, that shall be valid, but if he execute a receipt only, it shall be void.

But we must abide by the old decisions, which have long since determined, that payment of part in discharge of the whole

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does discharge the whole, if shown by a release under seal ; but if shown by a written agreement, or a receipt, or any proof short of a release, it does not.

In the notes to *Cumber v. Wane*, in 1 Smith's Leading Cases, p. 450, the American annotator argues that this rule of law requiring proof of such an agreement by a technical release "is a principle duly established in the elements of the law, which has long sustained itself in the courts, and rests on something better than a mere technicality." He proceeds, "But as a principle of evidence, this rule, which requires for the substantiation of such agreements, either a *surrender of the instrument*, or a legal release, is a just, wise and convenient rule ; so great is the danger of fraud and mistake."

That the rule so much commended by the writer has been materially shaken, both in England and some of our American states, is amply shown by the cases so copiously cited in his notes. It is not, perhaps, desirable that a rule of law so long settled and acted upon as this has been, in this state, should be disturbed by judicial decision. Nor is it necessary even to examine it and its qualifications, in order to decide this case. It is sufficient for us to hold that the surrender of an instrument to be cancelled by the party to whom it belongs, is equivalent to a release.

A release is the act of a party by which he does what he has agreed to do. Before the release is executed, his liability stands upon agreement merely, and if the agreement is without consideration, he may legally refuse to do what he has agreed. He may back out from his agreement, but not from his release.

The surrender of the instrument in which the party's rights appear is also the act of the party. Giving it up would seem literally to be dissolving the contract "*eo ligamine quo ligatur.*"

We think the surrender of the notes by the owner to the maker may well be put upon the same ground as a release,—as being an act of the highest significance and clearest import to show the deliberate and well understood agreement of the parties. It is their agreement *executed* ;—a release in practical operation. It is free from liability to mistake or fraud. The deliberate

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surrender of notes by the owner to the maker, to be cancelled, is an act which no man of prudence, or of the least knowledge of business, would do, unless he intended to discharge the debt. A release, as well as the surrender of notes, may be procured by deceit and fraud,—but when they are made according to the intent of the parties, they should be sustained.

We do not find this question directly decided in any of the books which we have had the opportunity to examine. But the decision as here announced seems to us reasonable, and consistent, in the main, with the decisions on this subject.

Judgment affirmed.

EZRA C. HUTCHINS v. ISAAC WAITS, AND DAVID W. CHOATE,
Trustees, AND E. W. SARGEANT, Claimant.

Trustee Process. Assignment of Chose in Action. Notice.

The defendant verbally agreed to assign to the claimant a demand in his favor against the trustee, whereupon the trustee was called in, and, in the claimant's presence, was informed by the defendant that he had transferred his claim against him to the claimant, and was requested by the defendant to pay it to the claimant, and it was understood by all three of the parties that the trustee was to account to the claimant for the defendant's demand. *Held*, that the assignment from the defendant to the claimant was a present and perfected one, and that the notice to the trustee was sufficient to prevent the subsequent attachment of the claim by means of the trustee process by the defendant's creditors.

TRUSTEE PROCESS. The commissioner reported that the trustee was indebted to the defendant for the latter's interest in the settlement of a partnership, which had existed for a year previous, between the defendant and the trustee, and which the trustee was closing up by collecting the assets and paying the debts; that while the trustee was engaged in closing up the affairs of such partnership, the defendant being indebted to the

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claimant, agreed with the claimant to transfer to him his interest in the previous year's business with Choate. No writing was executed between the parties, but the trustee was called in, and the defendant informed him that he had transferred his interest in the concern to the claimant, and requested him to pay over to the claimant whatever his interest might turn out to be. The claimant was present on this occasion, but it did not appear that he said anything to the trustee, nor did the evidence show what the trustee said. The commissioner found that it must have been understood by all three, (the defendant, the trustee, and the claimant,) at this time, that the trustee was to account to the claimant for the defendant's interest in the concern, whenever it should be settled and the amount realized out of the assets. This all took place before the service of the plaintiff's writ upon the trustee.

Upon these facts the county court, POLAND, CH. J., presiding, decided that the trustee was not liable, and that the fund in his hands belonged to the claimant, to which the plaintiff excepted.

Edwin Harvey, for the plaintiff.

Bliss N. Davis, for the claimant.

KELLOGG, J. In the case of *Noyes v. Brown and trustee*, 33 Vt. 431, it was held that an assignment of a chose in action by words, without writing, operates as an equitable transfer of it, and, when followed by notice thereof, from the assignee to the debtor, will be protected and enforced by courts of law, against a subsequent attachment by trustee process.

It is claimed by the plaintiff that no assignment by Watts, the principal defendant, of the effects and credits in the hands of Choate, the trustee, to Sargeant, the claimant, was ever consummated, and that the facts only show an agreement to assign at some future time; but we think that the commissioner's report does not sustain this claim. The report finds that Watts, in an interview with Sargeant, "agreed to transfer to him his interest in the previous year's business with Choate." This statement,

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when isolated from the context and literally interpreted, might possibly be taken to refer to an assignment to be executed in future. But it is to be taken in connection with the other facts reported by the commissioner, viz :—that Choate was thereupon called in, and, in the presence of the claimant, was informed by Watts that he had transferred his interest in “the concern” to the claimant, and was requested by Watts, at the same time, to pay over to the claimant whatever his, (Watts,) interest might be. It is also especially to be considered in connection with the commissioner’s finding, that “it must have been understood by all three,” (Watts, Choate, and Sargeant,) “at this time, that Choate was to account to Sargeant for Watts’ interest in the concern, whenever the concern should be settled, and the amount realized out of the assets.” These facts and this finding show conclusively that it was a present and perfected assignment, which was in the contemplation of the parties, and not an assignment, or transfer, which was to be made or perfected at some future time. Accordingly, we think that, as between Watts and the claimant, the effects and credits of Watts in the hands of Choate, were effectually transferred or assigned by Watts to the claimant.

The plaintiff also claims that there was no notice to the trustee of this transfer or assignment by Watts to Sargeant. The facts and finding of the commissioner above referred to, show that the notice to the trustee was clearly sufficient in its terms. But it is insisted that it was ineffectual because it proceeded from Watts, and not from the claimant; and the case of *Webster v. Moranville and trustee*, 30 Vt, 701, is cited in support of this position. We have no disposition to qualify the rule upon this subject, which was adopted in that case, or to recede from it in any respect. It appears in this case that the notice to the trustee was given by Watts, in the presence of the claimant, and without objection from him. His silence, under these circumstances, in connection with the other facts found by the commissioner, was equivalent to an adoption of the act by him; and the commissioner and the county court were justified in inferring from these facts that the notice was given with his approbation, and by his procurement. This would bring the

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case within the rule adopted in *Webster v. Morantville and trustee*. See also *Downer v. Marsh and trustee*, 28 Vt. 558. The time when the transfer or assignment by Watts to the claimant was made, and when this notice was given to the trustee, is conceded to have been previous to the commencement of this suit. In our judgment, the plaintiff's objections to the claimant's title to the effects and credits of Watts in the hands of the trustee, and to the sufficiency of the notice to the trustee of that title, are not well taken.

The judgment of the county court that the trustee is not chargeable as the trustee of the principal defendant, and that the fund in his hands belongs to the claimant, is affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
AT THE
GENERAL TERM,
HELD AT
MONTPELIER, NOVEMBER, 1862.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,	} ASSISTANT JUDGES.
HON. JOHN PIERPOINT,	
HON. JAMES BARRETT,	
HON. LOYAL C. KELLOGG,	
HON. ASAHIEL PECK,	

Le Barron v. Le Barron.

LE BARRON v. LE BARRON.

*Sentence of Nullity of Marriage. Jurisdiction. Supreme Court.
Common Law. Alimony.*

The legal system administered by the ecclesiastical courts in England, is a part of the common law of that country.

The power to grant divorces, and annul marriages for proper cause, has been an acknowledged head of jurisdiction in those courts from the earliest period.

The settlement of this country by colonists from England, under the dominion and authority of that government, had the effect to make the general common law of that country the law of this also, so far as applicable to the new relation and condition of things.

Jurisdiction of the subject of granting divorces, and annulling marriages, never having been exercised by the ordinary law courts in England, could not be exercised by the same courts in this country, until jurisdiction was given them by the legislature, and, until then, the jurisdiction was in abeyance, or rested in the legislature.

But when jurisdiction of the subject is bestowed upon any tribunal, it is to be exercised and enforced according to the settled principles and practice of the English courts having the jurisdiction there, so far as applicable to the altered condition of things here, and not repugnant to the spirit of our constitution and laws; and it is not a mere statutory jurisdiction, where the power of the court is limited wholly to what the statute in terms authorizes.

The settled practice in the English ecclesiastical courts in divorce suits for incurable impotence is, to require a medical examination to ascertain the truth of the allegation.

Impotence being made by our statute a cause for nullifying a marriage, and the legislature having vested the supreme court with jurisdiction of the subject, the court have power to compel the defendant to submit to a medical examination, though the statute makes no provision for it. Whether in such case the court have power to compel the defendant to answer interrogatories on oath,—*quære*: its exercise refused in this particular case.

It seems, that an application of the above principles would authorize the court to order the payment of temporary alimony, though not provided for by statute.

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Peck & Colby, for the petitioner.

O. H. Smith, for the defendant.

POLAND, CH. J. This is a petition by the wife for a sentence of nullity of marriage, for the alleged physical impotence of the husband.

At the last stated session of the court in Washington county, the petitioner filed a motion for the appointment of a commissioner or referee, to inquire and report as to the allegation of the defendant's impotence, and that the defendant be required to answer interrogatories touching said allegation; and also to submit to a personal examination by medical men, under the superintendence and direction of such commissioner. So far as the motion prays that the defendant be compelled to answer interrogatories, or to be examined by physicians, the defendant resists it. This being the first time within our knowledge that an application of this character has been made in this state, and only three members of the court being present, it was deemed advisable to hold the matter under advisement until the present term, to obtain the opinion of the whole court.

The objection to the motion is based upon this ground: that the whole jurisdiction and power of the court over the subject of granting divorces and annulling marriages, is given by statute; that the court has no power except such as the statute confers; and that, as the statute does not give the court the power to require such an examination, therefore it does not possess it. If this be the true view of the jurisdiction and power of the court—that they can only exercise such powers as are expressly given by statute—then the objection of the defendant must be sustained, and the motion denied.

To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject.

The legal power to annul marriages has been recognized as existing in England from a very early period, but its administration, instead of being committed to the common law courts, was exercised by their spiritual or ecclesiastical courts. Under the

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administration of those courts, for a long period of time, the principles and practice governing this head of their jurisdiction, ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted, with those systems, a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land, and was so held by the courts of that country.

This country having been settled by colonies from that, under the general authority of its government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this country. except so far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country, (aside from their parliamentary legislation,) and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts, (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws,) as well as that portion of their laws administered by the ordinary and common tribunals.

As the jurisdiction in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country, until it was vested in them by the law-making power. As we have never had any ecclesiastical courts in this country, who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it, or rested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces, as many of them did, in former times. When the legislature establish a tribunal to exercise this jurisdiction, or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty, to exercise it, according to

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the general principles of the common law of the subject, and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute.

Such has been held to be the effect of a creation of a court of chancery, or giving equity jurisdiction, either total or partial, to a court of law, by the legislature. Such jurisdiction is to be exercised according to the general principles and practice of the chancery courts of the mother country.

In the state of New York, the legislature vested the jurisdiction to grant divorces and annul marriages in the court of chancery. In *Williamson v. Williamson*, 1 Johns. Ch. 488, Chancellor KENT said: "The general principles of English jurisprudence on this subject must be considered as applicable, under the regulation of the statute, to this newly acquired branch of equity jurisdiction, and the legislature intended, in granting the power of divorce, that those settled principles of law and equity on this subject, which may be considered a branch of the common law, should be here adopted and applied."

In *Devanbagh v. Devanbagh*, 5 Paige 554, which was a case very similar to this, and upon a similar application, Chancellor WALWORTH said: "When the legislature conferred this branch of its jurisdiction upon the court of chancery, it was not intended to adopt a different principle from that which had theretofore existed in England, and indeed in all Christian countries, as to the nature and extent of the physical incapacity which would deprive one of the parties of the power to contract matrimony. And the court is, by necessary implication, armed with all the usual powers, which, in that country, from which our laws are principally derived, are deemed requisite to ascertain the fact of incapacity, and without which it would be impossible to exercise such jurisdiction." See also, on this subject, Bishop on Marriage and Divorce, chap. 2, §§ 16-28.

The uniform and settled practice in the ecclesiastical courts in England, in this class of cases, is to require a medical examination, and to compel the party to submit to it, if he will not do so voluntarily. *Norton v. Seton*, 1 E. E. Rep. 384; *Briggs v. Morgan*, *Id.* 408. In the last case, Lord STOWELL

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states the reason and foundation of the rule : "It has been said that the means resorted to for proof on these occasions, are offensive to natural modesty ; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own."

The statute of New York, like ours, made impotence a ground for annulling a marriage, and, like ours, was wholly silent as to the power of the court to compel an examination, to furnish the proof of its existence. Yet it was held there to be clearly within the power of the court to require such examination, upon the ground, that such being the settled practice in England, it had been adopted as the law here ; and also, that it was a necessary means to enable the court to make effectual and operative the power given to annul marriages for such cause ; *Devanbagh v. Devanbagh*, cited above ; *Newell v. Newell*, 9 Paige 25. If these decisions in New York are sound law, they are equally applicable here.

The power to grant divorces and annul marriages, has been by our legislature vested in the supreme court but no provision has been made by statute in relation to the mode of obtaining proof, or what proof shall be required. In thus conferring jurisdiction of this subject upon the court, it must be intended that all incidental powers necessary to make its exercise effectual, are also given, and that this is to be done in accordance with the principles and practice of the English courts, so far as applicable to the condition and circumstances of our people, and not contrary to any of our legislation, and the general spirit of our laws. Impotency, by our statute, is made a ground for annulling a marriage. Ordinarily, this is a matter which can not be proved by witnesses. The very nature of the fact precludes it, and if the court have no power to compel an examination, for the purpose of ascertaining the fact, it would in most cases amount to an absolute denial of justice, and that part of the statute making this a cause for nullifying a marriage, would be a dead letter.

Upon authority and reason, we are clearly satisfied that the

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power exists in the court to compel such examination, although the statute does not provide for it.

As to the other branch of the application, that the defendant be required to answer interrogatories, we have much more doubt. We do not find that such was the practice in the spiritual courts in England; but that is explained, probably, upon the ground that the proceedings there are conducted more in the form of chancery suits, and the defendant puts in a sworn answer to the application for divorce or sentence of nullity. In New York, in the two cases cited, their courts ordered the defendant to answer interrogatories. It has already been decided in this state, that in divorce cases the parties can not be witnesses; hence, if in this case the petitioner were able to produce such proof as would establish what she claims, the defendant could not use his own testimony to controvert it. If, then, he is compelled to answer interrogatories, it is really enabling the petitioner to use his testimony when he could not; which does not seem just. The objection does not apply to compelling him to submit to an examination; because he could voluntarily be examined, and use the result as evidence for himself, if he chose.

We do not decide that the court have no power to compel the defendant to answer interrogatories, but we decline to make such an order in this case, at the present time.

The defendant, in support of his view—that the power of the court over the subject of divorces is wholly a statutory jurisdiction, and that therefore the court have no powers except such as are expressly conferred by statute—cites *Harrington v. Harrington*, 10 Vt. 505, and *Hazen v. Hazen*, 19 Vt. 603. They are both short notes of decisions in divorce cases. In the first, the defendant moved the court for temporary alimony, for her support during the pendency of the petition, and to enable her to defray the expenses of resisting it. The court said: “The statute gives this court, which in applications for divorces acts as a court of law, no power to grant alimony, except after divorce granted.” *Hazen v. Hazen* was a like application to the court, and the court denied it, referring merely to their decision in *Harrington v. Harrington*. Neither of the cases appear to have been argued, or to have received any particular examina-

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tion or consideration by the court, and they were probably decided, as such motions usually are in such cases, from the bench, without either. They appear, however, to have proceeded upon the same idea of the jurisdiction and power of the court which the defendant maintains, which we have already attempted to show is erroneous. In the very matter of temporary alimony, no better illustration could be found to show the evil effect and unsoundness of the doctrine. In England, where the petition for divorce is by the husband, such application by the wife is universally granted, on showing a proper case of reasonable necessity for it. It is done upon this plain and reasonable ground, that the husband, having the entire control and possession not only of all his own property, but also of that of the wife, while the marriage subsists, and being liable by law to maintain and support the wife, the court will, when he appeals to their jurisdiction, require him to furnish her the means to live pending the litigation, if he have the ability to do so, and she be destitute; as otherwise she might suffer or starve. And upon the same principle, they will compel him to furnish her means to make her defence, as otherwise she might be denied justice. It is by no means beyond the range of reasonable supposition, that a man might force his wife to leave him, and then, by some false charge, supported by false testimony, attempt to procure a divorce; and if, in such case, she must be compelled to litigate with her husband the question, of all others the most important to her, without means to procure witnesses or employ counsel, or even to live, it is certainly a great reproach to our laws. We are glad to be able to say, that in our judgment they merit no such reproach.

In most of the states in our government, the courts have exercised the power of granting temporary alimony, even when their statutes do not provide for it, upon the ground that the power grows out of the very nature of the proceeding, and the necessity of the case, to prevent, in many cases, the grossest wrong and a failure of justice. Had the subject been examined and considered by the court, at the time the cases above named were decided, we have no doubt an entirely different view would

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have been taken. In accordance with the views above expressed, temporary alimony was ordered in another cause at this term. In consequence of the novelty of this application in this state, we have given the subject more consideration than is usually given to cases of this character, and have thought it advisable to express the views of the court so much at length, as to have them understood.

It is ordered in this cause, that a commissioner be appointed to take the proofs in relation to the alleged incurable impotence of the defendant, at the time of the said marriage between him and the petitioner. And it is also ordered, that the defendant submit himself to a personal examination by such physicians and surgeons, at such time and place, and under such regulations, as shall be selected and prescribed by the said commissioner, for the purpose of determining the truth of the said allegation in said petition.

The commissioner will select such number of competent and disinterested physicians and surgeons, and prescribe such rules and regulations in relation to such examination, as to secure the utmost fairness of such examination, and will report all his proceedings in relation thereto, with the evidence of all such medical examiners as to the facts and results of said examination, and return the same, together with the other proofs taken by him, to the court.

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HORATIO BROOK v. THE CONNECTICUT AND PASSUMPSIC RIVERS
RAILROAD COMPANY.

[IN CHANCERY.]

Railroads. Chancery. Injunction.

A railroad corporation, being obliged by their charter to fence their road, for the purpose of constructing a permanent fence along their track through the orator's meadow land, which was liable to be overflowed, commenced to plant willow trees on each side of their track upon the land used by them for railroad purposes, and within three feet of the orator's line, with the expectation that they would grow and be used to attach boards to, thus making a fence, which, in the judgment of the officers of the corporation, would be more permanent, serviceable and economical, than one constructed in any other manner. It having been proved that such trees, by growing and spreading their roots into, and their branches over, the orator's land, would be a serious injury thereto, and that there was no controlling necessity for the construction of a fence in that particular manner, it was held, that the corporation might properly be enjoined, by a court of chancery, from planting such trees.

BILL IN CHANCERY. The orator alleged in his bill that the defendants had, by virtue of their charter, taken a portion of his meadow land in Newbury, five rods in width and seventy-five rods in length, and had built their railroad thereon, and had fenced and occupied the same, for some time previous to the bringing of the bill, for railroad purposes; that the orator's land along the defendants' railroad, and on both sides thereof, was occupied by him for purposes of tillage and mowing, and was very valuable for such uses; that the defendants had commenced to plant great numbers of trees along each side of their railroad, about three feet from the line of the strip of land taken by them from the orator as aforesaid; that such trees when grown would cause great and permanent injury to the orator's land; that the roots spreading into the soil would greatly obstruct tillage and ploughing, and the tops would shade and spoil the orator's land to a considerable distance, and would cause great and irreparable injury to the orator; and that no such use of the orator's land was ever named or considered in the appraisal of damages for the taking of the land by the defendants for railroad purposes under their charter, but that such use was

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new, unusual, and entirely unwarranted. The bill prayed for an injunction to restrain the defendants from proceeding farther in the setting of such trees along the orator's land, and a temporary injunction to that effect was granted by the chancellor.

The defendant's answer set forth that a portion of the land enclosed and used by them for railroad purposes adjoining the orator's meadow, was taken by them from the orator under their charter, and the damages for such taking were duly appraised and paid by them to the orator, and that the remainder was purchased by the defendants of various persons, and that the defendants had received from such persons duly executed deeds thereof; that the duty was imposed by law upon the defendants to build and keep in repair a sufficient fence on each side of their track; that the orator's land was mostly low meadow, and subject to be overflowed in times of high water to such an extent, as to carry away the fences constructed in the ordinary way; that the defendants had in such cases sometimes tried the experiment of a fence upon the railroad embankment, but that such fence was in the way of clearing the snow from the embankment in the winter season, and that the embankment was liable to be so washed away by heavy rains as to allow cattle to pass under the fence upon the track; that, with such experience, the defendants had caused willow stakes to be set along the margin of the strip used by them for railroad purposes, adjoining the orator's meadow, on each side of their track, and about three feet from the orator's land, with the expectation that they would take root and grow, and that boards would be nailed to these stakes, and a fence thereby constructed, which would withstand the high water floods; that such a fence, as the defendants proposed thus to construct, would also be beneficial as a kind of *breakwater* to protect the railroad embankment from the action of the floods; that it was not possible in any other manner, by any reasonable expenditure, to maintain a sufficient fence along their road through the orator's land, as required by law; and that such willow trees, as set by the defendants, would not, to any appreciable extent, injure the orator or his land.

This answer was traversed, and testimony was taken on both

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sides, the general balance of which is sufficiently stated in the opinion of the court.

The cause was tried upon its merits, before Chancellor POLAND, who rendered a decree that the temporary injunction be made perpetual, and that the orator recover his costs, from which decree the defendants appealed.

Peck & Colby, for the orator.

T. P. Redfield, for the defendants.

PIERPOINT, J. This bill is brought to restrain the defendants from planting and continuing willow trees along the line of their road, on each side, through the land of the orator, and upon or close to the division line between the railroad and the orator's land.

The orator alleges in the bill that said trees are planted within a few feet of each other, and so near to the division line that, if they are permitted to remain, in a few years they will extend their branches over, and their roots into, the land of the orator, that sprouts will spring up therefrom in the orator's soil, that dead and broken branches will be deposited thereon, and a shade so cast upon it, that the land of the orator for a considerable distance back from the line of the railroad will be so exhausted and injured as to be rendered nearly valueless for the purpose of cultivation.

The defendants in their answer admit the planting of the trees, with the intention of having them remain and grow, and with the purpose, when they shall have attained sufficient size, to attach boards to them, and thus make a fence along the sides of their road. They allege that the land on which their road is laid, is in many places low, and in periods of high water is overflowed to such an extent as to make it difficult to maintain a fence constructed in any of the ordinary modes, and they deny all improper motives in planting the trees, and they also deny that any such injury is likely to ensue to the orator therefrom, as he has alleged in his bill. The defendants also allege in the answer that such a fence as they contemplate, will be beneficial

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to them as a protection to their embankments in certain low places, where in high water they are liable to be washed away.

In the course of the argument it has been conceded on both sides, that the defendants have planted willow trees along a large portion of their road; and that other land owners have also commenced proceedings to restrain them from so doing; and that this case comes here as a *representative* case, for the purpose of settling the question as to them all.

From a consideration of all the testimony which has been introduced on both sides, we are of the opinion that the orator has established the fact by a fair balance of testimony, that the planting and continuance of the trees and their growth, as designed and contemplated by the defendants, would produce the injuries to the orator which he has alleged in his bill would result therefrom.

The question then arises, have the defendants a right to plant and cultivate a row of willow trees on each side of their road, through the orator's land, in the manner and for the purposes contemplated, notwithstanding the great injury that must inevitably ensue to the orator therefrom? The defendants surveyed their road across the orator's land, under and by virtue of their charter. Whether they obtained it all by proceedings *in invitum*, or whether a part was transferred to them by deed, would seem to be immaterial, so far as this question is concerned. They obtained it for the purpose of constructing and operating a railroad. By their charter the company were bound to fence their road, and it was in view of this obligation that the price to be paid was fixed upon by the commissioners or the parties, but evidently neither party contemplated that the road was to be fenced in this unusual and extraordinary manner, in a way that should virtually destroy or render nearly worthless an amount of land along the sides of the road nearly, if not quite, equal to the amount taken, and that, too, by the introduction into the farms of the willow tree, which some of the witnesses represent as the common enemy of the farmer in that vicinity, and one with which they have been contending half their lives, a tree that most of the witnesses seem to consider as injurious to the surrounding land, to an extent beyond that of most other trees.

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Whether one of two adjoining land owners, holding their titles in fee, and for the ordinary purposes of cultivation, would have the right to construct a fence in this manner on the line between them, to the manifest injury of the other, is a question we are not now called upon to decide.

But we think, in order to justify the railroad company in resorting to this method of fencing their road, in view of its effect upon the adjoining proprietor, there must be some strong and controlling necessity for their doing so.

And we are wholly unable to find from the evidence the existence of any such necessity. There would seem from the testimony, to be no great difficulty, with but slight additional expense, in constructing a fence in the ordinary form, that would withstand the freshets that the fences on this road are subject to.

This case is not like the case of *Brainard v. Olapp*, 10 Cushing 6. There the action was brought for cutting trees by the corporation that stood within the line of their road. This they had an undoubted right to do, if they judged best. That they might, and probably would, do this, all must have contemplated at the time the land was taken, and if any damage would ensue therefrom, it was embraced in the award of damages. The act was in accordance with the ordinary practice in such cases, and could produce no injury to the soil of the adjoining proprietor.

In regard to the power of a court of chancery to interfere, we think the authorities are clear that the court does possess the power. Story, in his work on Equity Jurisprudence, says, section 928: "There can not be the slightest hesitation, that if the acts done, or threatened to be done, would be ruinous, or irreparable, or would impair the just enjoyment of the property in future, a court of chancery would interfere. Indeed, if courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country."

The decree of the chancellor is affirmed, with costs, and the case remanded to the court of chancery.

State v. Center et al.

THE STATE OF VERMONT v. SUSAN CENTER AND W. H. H.
CENTER.

Dying Declarations. Evidence. Criminal Law. Confidential Communications. Manslaughter.

Dying declarations, to be admissible in evidence as such, must have been made under the full and firm belief of near and approaching death.

Whether the declarations are made under such belief is to be decided solely by the court.

The interval of six days between the making of the declarations and the date of death, is not of itself sufficient to exclude them as evidence.

At the time of making certain declarations, sought to be introduced as dying declarations, the declarant stated that she knew she should die, but also remarked that *if she lived to get well* she would never go again to the place where the prosecution claimed she received the injury of which she died. At this time she was not regarded as dangerously sick by her physician or attendants. *Held*, that the declarations were not admissible.

Vague and indefinite expressions, and all language which does not distinctly point to the cause of death, and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible.

A conversation between the respondent and her husband, tending to show an admission of her guilt to him, and overheard by a witness who was in an adjoining room, is not such a confidential communication, as the law excludes as evidence.

If a man, in order to have unlawful sexual connection with a female, by her consent, uses artificial means to make such connection practicable, and by carelessness or negligence in the use of such means, inflicts upon her a wound which causes her death, he is guilty of manslaughter; as is also another person, who assists him in the use of such means, with knowledge of the purpose thereof.

INDICTMENT for the murder of Martha Wheeler. Plea, not guilty, and trial by jury, at the September Term, 1860, POLAND, J., presiding.

The respondent, Susan Center, was step-grandmother of Martha Wheeler, and the other respondent was her son, and half-brother of the mother of Martha Wheeler.

The respondents resided with Dearborn Center, husband of Susan Center, and father of the other respondent, in Cabot.

Martha Wheeler was nearly fifteen years old, and a very large, healthy girl, and her parents lived in Albany, in Orleans county. In April, 1860, Martha Wheeler came to Cabot to live in the family of a Mr. Hoyt, as a hired girl, Hoyt being a farmer, and living near the respondents. From the time Martha Wheeler came to Hoyt's she was very friendly with the respondents, often going there, and usually spending some portion of every sabbath at their house; but this was not approved by her mistress, Mrs. Hoyt, and she requested Martha not to visit the respondents on Sundays. On Sunday, the 1st day of July, 1860, near evening, Martha Wheeler went to the house where the respondents lived, and did not return to Hoyt's until late in the evening, the precise time did not appear. The next morning she assisted in the work, and then went to Cabot village to see a caravan, which was exhibited there that day, and returned to Hoyt's at night, and assisted in milking.

In going to the caravan she rode with Mr. Hoyt's family as far as her grandmother's, where she stopped and rested with them. There was some evidence that on that day she exhibited appearances of approaching illness, that she complained of being tired, and did not appear to be interested in the exhibition, but there was no evidence that she made any complaint of illness, or pain, or injury.

On Tuesday morning she arose, and went about her work, but soon complained of head-ache and dizziness, when Mrs. Hoyt had her go to bed, and gave her medicine for a cold, which she supposed to be the difficulty with her. She continued to grow worse until Saturday of that week, when Dr. Goodwin, of Cabot, was called to visit her, who pronounced her disease to be *Typhoid* fever, and for which he treated her. She continued, however, to grow worse, and on the evening of the following Friday she died. It appeared that during her sickness, she had bloody discharges from her private parts, quite offensive in smell, that she appeared stiff in the region of her hips, and unable to move her limbs, and had great difficulty in voiding urine.

The body of the girl after her decease was taken to Albany, and there buried, and on the 6th of August following, it was

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disinterred and examined, to ascertain the cause of her death. Dr. M. P. Wallace, of Cabot, one of the physicians present at the examination, was called as a witness, and testified that "the private parts of the girl were swelled externally. On opening those parts we discovered what we called a wound, and examined it. The swelling was on the right side of the *labia*, the inner lip was swollen so that it protruded; the wound was about opposite the *hymen*, 1-4th to 1-2 inch one side of vagina, or entrance of the womb, where it commenced. I probed the wound; the probe passed half its length, at least three inches in depth. Then I dissected the parts, removed the *Pubic bone* so we could see the womb. The wound kept on the outside of the passage to the womb, in an oblique direction. It was a simple flesh wound, hit no blood vessel. We came to the unanimous conclusion, that the wound must have been produced by violence, with some blunt instrument to us unknown. We examined the stomach, bowels, and liver, and all appeared healthy, and we found no other cause of her death, except this wound. The wound was below the *urethra*, and to the right. The opening of the wound was about the same size as that of the *urethra*. The bottom or base of the wound appeared to be larger than the entrance. It appeared as if the instrument had been worked up and down, or inserted twice, and not following the same track both times. The *Hymen* was lacerated, and broken; the injury appeared to be recently done, as shreds of it remained very unyielding and tough. As we found the hymen, there was no obstruction to an entry, but before it was ruptured, we were satisfied no man could have entered in the natural way. All by which we could tell whether she had ever had connection, was the rupture of the hymen. There was no appearance of pregnancy, or that there ever had been. We concluded it was a wound, and not an abscess, a puncture, made with an instrument, and that if left, wholly unattended, it would be likely to produce death."

It was claimed on the part of the prosecution that the respondent, Harrison Center, in the evening of that 1st of July, aided by his mother, attempted a forcible violation of the person of Martha Wheeler, but that her natural condition was such that

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he was unable to effect a penetration, and that for the purpose of enabling him to accomplish his purpose, he, with the aid of his mother, attempted to make a forcible penetration of the hymen with some instrument, but that by reason of Martha's resistance and struggles, the wound or incision found on her person was made, and that the same caused her death.

No direct evidence was introduced tending to prove that the wound was given by the respondents, or either of them, or the purpose of it, but a great variety of circumstances, in the acts and declarations of each of the respondents, were proved, which were claimed to tend towards proving them guilty as claimed.

The government in support of the prosecution relied on certain declarations of Martha Wheeler made, during her sickness, to Ann Lyford, and Mrs. Wheeler, her mother. Ann Lyford testified, that she went to Mr. Hoyt's, on Friday, July 6th, to nurse Martha, and took care of her till Monday following. That on Friday and Saturday Martha said she knew she should die, and on Sunday said she knew she was doomed to die; that on Saturday she conversed with Martha about the cause of her sickness, and asked her why she was so sore and stiff, and Martha replied, that she supposed she had taken cold. The prosecutor then proposed to prove by the same witness, that on the same Saturday, she pressed the same inquiry upon Martha, and that Martha said in reply, "that if she had minded Mrs. Hoyt and staid at home, she should not have been sick as she was now." This statement was objected to by the respondent's counsel, as not admissible, because not made under such expectations of impending death by Martha, as to make her declarations admissible, and also because the declaration itself was of so general and vague a character. But the court overruled the objection and admitted the evidence, to which the respondents excepted. The witness then stated the declaration of Martha to her, according to the offer, and also added, that Martha said further, "that if she lived to get well she would never go there again." It appeared from all the evidence in the case, that at the time of these declarations, Martha

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was not considered by her physicians and others to be dangerously sick.

Mrs. Wheeler, the mother of Martha, testified as follows : " I first saw Martha, after her sickness, on Thursday evening, July 12th, and remained with her till she died, about twenty-nine hours. Martha understood she could not live, and gave me some directions about the distribution of some of her things to the other children. On Friday evening before she died, she appeared to be in great distress. I asked her where the pain was? she could not talk very well ; she put my hand and her hand on her private parts, and began to cry. I then examined, saw she was badly swelled, very bad. I saw she was badly injured, and examined to see, tried to examine, but it hurt her so I could not. I told her my step-mother was the cause of this. She looked up in my face and said, ' Harry—Harry.' That was all she said that I could understand. Harrison Center goes by the name of Harry." The above reply of Martha to her mother was also objected to for the same reasons, as her declarations to Ann Lyford, but the same was allowed to go to the jury, to which the respondents excepted.

John H. Damon testified, " I was the officer who arrested the respondents, and committed them after they were bound over for trial by a magistrate. After they were bound over, Mrs. Center wanted to go home to make some arrangements about her affairs, and I carried her to her house. I sat in the kitchen ; Mrs. Center and her husband were in another room, arranging about their things. There was a small entry between the rooms, but the doors were open. Mr. Center spoke, and said, '*It is too bad ! too bad !*' Mrs. Center replied, '*Who is to blame ?*' Mr. Center said, '*I don't know.*' Mrs. Center said, '*Captain ! Captain ! if it had not been for you, this would never have been known !*' Mr. Center replied, *that he knew he talked a great deal.* There were no persons in the room except Mr. and Mrs. Center." This evidence was objected to by the respondents, as being confidential conversation between husband and wife, but the same was admitted, to which the defendants excepted.

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The respondents' counsel claimed that where dying declarations are admitted as evidence, (there being proof tending to show that the person making them is under the expectation of immediate death,) still it was ultimately a question for the jury to pass upon, whether such expectation of death existed or not, and in relation to the declarations of Martha Wheeler, above recited, the court instructed the jury, that in order to make such declarations admissible as evidence, it must be satisfactorily established, that Martha Wheeler, at the time of making them, had no expectation that she should recover, but that she must very soon die, and that if the jury thought from the evidence that she did not so expect and believe, then those declarations should be laid out of the case, and not weighed at all. No exceptions were taken to the charge upon this evidence, but the respondent's counsel claimed, that the court should have excluded it from the consideration of the jury.

The respondents excepted to the following portion of the charge to the jury :

The court told the jury that if they found, that Martha consented to have sexual connection with the respondent, Harrison Center, but in consequence of her condition he was unable to effect a penetration, and she consented that the respondents might use artificial means to perforate the hymen, and they did so, and thereby gave her a wound that caused her death, though not intending it, still it would be manslaughter, if they were guilty of such carelessness and negligence, either in the manner of doing it, or the instrument used for that purpose, as endangered the life or personal safety of the girl.

The jury found both defendants guilty of manslaughter.

Peck & Colby, for the respondents.

H. W. Heaton, state's attorney, for the prosecution.

ALDIS, J. Dying declarations are admitted in cases of homicide, both from necessity, and because the near approach of death is supposed to impress the mind with as solemn an obligation to speak the truth, as would the administration of an oath.

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The state of mind of the person making such declarations, is to be regarded ; it must be that he really believes that he is soon to die. Some of the cases directly decide that he must have no *hope* left of recovery, and such is the general tenor of the books. A late decision in New York, 2 Wheeler's Crim. Cases 398, *People v. Anderson*, seems to hold that a mere, faint, lingering *hope* of recovery should not exclude the declaration. Without entering upon any nice inquiry, whether such a hope may coexist with the settled belief of impending dissolution, we think it best to follow the old and settled rule, that the declarations must be made under the full and firm belief of near and approaching death.

We may well question whether the solemn impression, which impending death brings upon the mind, would not be materially lessened by any hope of recovery, however slight ; 3 O. & P. 598 and 629.

Whether the declarations were made under such belief, is a question for the court to decide. It is not enough that the evidence tends that way. The court may not for that reason admit them, and leave it to the jury to decide whether they will or will not regard them. But the court is in the first instance to be satisfied by the proof that the declarations were so made as to justify their introduction as evidence.

In the case at bar, the opinion of the court on this point is not expressed, but the facts are stated, and they remain for us to decide whether in law they are sufficient.

I. As to the declarations to Ann Lyford. They were made on Saturday, and the young girl who made them died on the next Friday. The length of time that elapsed between the declarations and the decease of the person making them, we do not deem a fatal objection. Death may be believed to be imminent, and yet be long deferred. Cases are referred to in the elementary works on criminal law, where "eleven days" and "several weeks" were not held so great an interval of time as to exclude the evidence. It is the state of mind of the party who makes the declarations, that furnishes the test of admissibility.

She said "she knew she should die." Such expressions

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standing alone would ordinarily be entitled to great weight, and warrant the admission of the evidence. They might, however, under some circumstances, be regarded as expressions wrung from a person by physical pain,—or utterances of anxiety and alarm, made to hasten or secure sympathy and aid, rather than the language of real conviction and belief. But here they do not stand alone. She said further, "that if she lived to get well, she would never go to Mrs. Center's again." This expression shows the hope, if not the expectation, of recovery. When taken in connection with the further facts—that the physician was called in on that day for the first time, that he said she was sick of typhoid fever, and that neither he nor others thought her dangerously sick, we think the evidence ought to have been excluded.

2. The declarations to Ann Lyford, and to her mother, made the day before she died, are objected to upon another ground—that they are too vague, and do not point distinctly to the cause of her death. We think this objection tenable. To Ann Lyford she said, when asked about the cause of her sickness,— "that she supposed she had taken cold," "that if she had minded Mrs. Hoyt and staid at home, she should not have been sick as she was now," "that if she lived to get well, she would never go there, (to Mrs. Center's,) again." None of these expressions indicate that any such injury had been inflicted upon her as the theory of the prosecution supposes. It is only by remote inference—by conjecture, that they can be made to have even a seeming connection with any wrongful act as the cause of her death. They are entirely consistent with her dying by natural disease—by catching cold, as she said. The last expression, that she would never go there again, may most reasonably refer to her regret at having disobeyed Mrs. Hoyt, and her intention to obey her in future.

When her mother, referring to her sickness and its cause, said to her, "my stepmother," one of the respondents, "is the cause of this," she said, "Harry, Harry," referring to the other respondent. Now if this had been all she said, it would not be unreasonable to understand that she meant that Harry was the cause of this, and thus the declaration, in connection with the

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other evidence, would have been admissible. But the witness says further, "that was all she said that I could understand," implying that she said more in the same connection, which she could not understand. Now the rest of the sentence, if it could have been understood, might wholly have exculpated Harry from all connection with the cause of her death. We can not tell what she did say, nor what she meant by the words that were understood. The prisoner is entitled to the benefit of the doubts which thus arise.

The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly related. As to dying declarations, there can be no cross examination. The condition of the declarant, in his extremity, is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions—all language that does not distinctly point to the cause of death, and its attending circumstances, but requires to be aided by inference or supposition, in order to establish facts tending to criminate the respondent, should be held inadmissible.

The conversation between Mr. and Mrs. Center, overheard by a witness who was in an adjoining room, does not belong to that class of confidential communications which the law excludes.

As to the remaining point—the charge of the court as to the negligence which would make the respondents guilty of manslaughter, while engaged in the perpetration of an indecent and immoral act, we are satisfied that it was entirely right. The case of *Rex v. Van Butchell*, 3 Carr. & P. 629, has no application. That was the case of a physician performing an operation upon a patient, with intent to cure him. He was engaged in a lawful employment, and endeavoring to render a beneficial service to his patient. Here the act was unlawful, if not criminal.

Judgment reversed, and case remanded for a new trial,

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GEORGE W. COLLAMER v. N. C. PAGE AND ORANGE FIFIELD.

Replevin. Judgment for Return. Jurisdiction. Costs.

If a court has no jurisdiction over the subject matter of an action, it can render no legal judgment in it, not even for the defendant to recover his costs, except when expressly authorized so to do by statute.

But where an action is brought in the wrong town or county, there is not a want of jurisdiction of the subject matter of the suit, but only an irregularity in the process, and this objection must be taken while the cause is pending, or the judgment will be valid.

An action of replevin was brought in a county where one of the parties resided, but not the county where the property replevied was detained, and for this reason the action was dismissed on motion. *Held*, that notwithstanding this disposition of the cause, the court had jurisdiction, and it was their duty, to render a judgment for a return to the defendant of the property replevied, without any proof of his right to have the property restored, and without any formal plea or avowry by the defendant; and that the plaintiff had no right to contest such a judgment on the ground that he owned the property.

But a judgment for a return of the property, under such circumstances, is not conclusive of the right of ownership of the defendant thereto. That question may be tried in another action.

But after a dismissal of the action for some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detaining, or improper use of the property replevied, tried or adjudicated.

REPLEVIN for one hundred and thirty-five sheep, alleged in the writ to belong to the plaintiff, who resided in Montpelier, in Washington county, and to have been taken and attached by the defendant Page, a resident of Washington county, and by the defendant Fifield, a resident of Orange county. The writ was made returnable to the Washington County Court. From the officer's return upon the writ, it appeared that he found and replevied the sheep in Orange county, at the residence of the defendant Fifield.

The defendants filed a motion to dismiss the action, on the ground that, as it appeared from the writ and officer's return, that the sheep were detained in Orange county when replevied,

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and that therefore the writ should have been made returnable to the Orange County Court.

The county court sustained the motion, and dismissed the action.

The defendants thereupon moved for a judgment for a return of the property replevied, and also for damages, alleging that one Cutler was the owner of the sheep replevied, and that they had been attached by the defendant Page upon a writ in favor of the defendant Fifield against Cutler; that Page, after attaching them, placed them in Fifield's hands for safe keeping, where they remained until replevied by the plaintiff; that Fifield had recovered judgment in his suit against Cutler, and had taken out execution thereon, and placed it in Page's hands for collection, and that the execution had been returned unsatisfied and was yet unpaid.

To this motion the plaintiff answered that Cutler never owned the sheep, but that they belonged to the plaintiff.

On the hearing of the motion for return and for damages, the defendants claimed, and offered to show, that since the sheep were replevied in this action, the plaintiff had sheared the sheep, and sold the wool, and received the pay for the same, and claimed that the value of the wool so sold should be included in the damages to be by them recovered, and that they were entitled to a judgment for a return of the property without introducing any evidence of ownership or right of possession in them.

The plaintiff objected to the evidence offered by the defendants as to the shearing of the sheep and sale of the wool, and the court rejected it, to which the defendants excepted.

The plaintiff claimed,

1st. That there could be no judgment for return of the property or damages in a case like this, where the action is dismissed on the defendants' motion.

2nd. That if any judgment for return or damages could be rendered, it could only be rendered upon evidence introduced by the defendants, showing the right of property and possession in them, and that the burden of proof of such right was on the defendants.

3rd. That if *prima facie* the defendants were entitled to such

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judgment, the plaintiff had a right to show by evidence that the right of property and possession at the time the property was replevied, was and still continued in the plaintiff, and not in the defendants, and thereby prevent such judgment; and the plaintiff offered evidence to prove this fact.

To the introduction of this evidence the defendants objected, and the court excluded it, to which the plaintiff excepted. The court thereupon rendered judgment, awarding a return of the property, with costs against the plaintiff, and refused to render judgment for damages, to which both parties excepted.

Wing, Lund & Taylor and *J. Collamer*, for the plaintiff.

Peck & Colby, for the defendants.

POLAND, CH. J. The plaintiff's action having been dismissed in the county court on motion of the defendants, because brought in the wrong county, the plaintiff insists that the county court had no legal jurisdiction thereafter to award any judgment except a judgment for costs.

The plaintiff's counsel have referred us to numerous authorities, where it has been held that if the court have no jurisdiction over the subject matter of a suit, they can render no legal judgment in it, not even for the defendant to recover his costs, unless authorized by express statute.

The position is well founded, both upon authority and reason.

The authorities all agree that when a court have no jurisdiction over the subject matter of an action, if the defendant appear and answer to it, and make no objection to the jurisdiction, and the action proceed to final judgment, the judgment itself is void; the objection can not be waived.

Was the ground of the dismissal of this action really an objection to the jurisdiction of the court, over the subject matter of the action? or an objection to the process, an irregularity which might be waived, or if not made, and the action proceeded to a judgment, such judgment would be valid?

The statute gives jurisdiction of this species of replevin, when the value of the property in controversy exceeds twenty dollars,

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to the county court. The statute also provides that the writ shall be returnable to the county court for the county in which the goods are detained. The action, being to recover personal property, is of a transitory character, and except for this provision of the statute, might well be brought in any county where either of the parties lived.

The general provision of our statute in relation to actions brought to the supreme and county courts, is that they shall be brought in the county where one of the parties resides; and suits before justices of the peace shall be brought in the town where one of the parties lives; but it was never supposed that, if brought in some other county, or town, it was a case of want of jurisdiction, so that if the action proceeded to judgment, the judgment would be void; *University of Vermont v. Joslin*, 21 Vt. 52.

We regard this case as being precisely of the same character, and that the ground on which this case was dismissed, was an objection to the particular process, and not a lack of jurisdiction over the subject matter.

In *Hall v. Gilmore*, 40 Maine 578, under a statute precisely like ours in this respect, it was decided, that if the suit be brought in the wrong county, the error, to be available to the defendant, must be shown in abatement. The error of the plaintiff's counsel, on this point, consists in confounding the two, and in some of the cases read, the distinction seems not to have been very clearly taken.

It is said, however, that whether this was really an objection to the jurisdiction over the subject matter of the action, or not, the county court dismissed it for want of jurisdiction, and having done so, the case was then beyond their power to make any further order, or render any further judgment.

This objection does not appear to us to be formidable. The real question is, was the defect one of want of jurisdiction over the subject matter. If it was, then the court could give no judgment except for costs. If it was not, then the court might proceed to render any further judgment, which the position of the case warranted. A suit is no more out of court, or beyond the power of the court, to perfect and enter the proper judgment,

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when dismissed, than it is when the suit is abated, or a judgment of nonsuit entered, either voluntarily, or by direction of the court. It is not material, as we think, by what name the determination of the suit was called, so far as affects the power of the court to perfect the judgment.

The plaintiff insists, that the judgment given for a return of the property repleved, in favor of the defendants, was unwarranted, because the cause was not terminated in either of the ways upon which the statute authorizes such a judgment to be given. The 17th section of the replevin act provides: "If it shall appear upon the nonsuit of the plaintiff, or upon trial, that the defendant is entitled to a return of the goods, he shall have judgment therefor accordingly, with damages for the taking thereof by the replevin, and costs of suit." The plaintiff says his suit was not terminated either by his becoming nonsuit, or by a trial, and therefore no judgment for a return could be rendered by the court.

This objection requires us to consider the intent and meaning of the statute, and especially of the words *by a nonsuit of the plaintiff*. The statute introduced a new kind of replevin, or applied the action to an entirely new use, as an action to try disputed titles to personal property. By its provisions, one claiming title to personal property in the possession of another, also claiming title, proceeds with his writ of replevin to divest the one in possession, and take the possession to himself, and is authorized to hold it until the suit be determined.

If the case be tried upon the merits, then of course the question of title, or right of possession, is tried, and then if the title or right of possession is found for the defendant, he is entitled to a judgment for a return, as a conclusive judgment in chier.

But the framers of the statute anticipated that actions of this character might be brought, and the possession of the property changed by the service of the process, and the suits be terminated in favor of the defendant, without any trial upon the merits; that the process might be defective, or the plaintiff might abandon his suit without trial, and unless there was a judgment for a return, the defendant's property, or property found in his

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possession, of which he claimed to be the owner, would be left in the hands of the plaintiff, and the defendant might be wholly without adequate remedy to obtain its restoration. This they intended to guard against, and in such case to put the defendant in as good a situation as he was before. In ordinary cases the payment of the defendant's costs is supposed to do this, but here the bringing the suit has taken the property from him, and given it to the plaintiff.

We think the legislature intended that in such case the plaintiff should restore the possession of the property to the defendant. It is said that the legislature used the word *nonsuit* in its strictest sense, as a voluntary abandonment by him of the case, and intended, in such event, to have a judgment for a return conclude the title, and prevent it from again being brought in question.

But there are many cases of nonsuit, where it is not the voluntary act of the plaintiff, but done by order of court, for the failure or inability of the plaintiff to comply with some order of the court. Such cases would be equally within the letter of the statute as those when a nonsuit was voluntarily entered by the plaintiff, but it would be quite severe to hold that in such case a plaintiff must submit to a judgment for a return, which concludes him from ever again setting up his title to property which lawfully belongs to him, and the title to which has not been tried at all in his suit which has failed. If the suit be abated, or dismissed, or quashed, for some defect or irregularity in the process, is there not precisely the same necessity for protecting the defendant, and requiring the property to be replaced, as before, in his possession, as if the suit ended either by a voluntary or a compulsory nonsuit? It is not reasonable to suppose that the makers of the statute intended he should have a judgment for a restoration of the property in the one case, and intended to deny it in the other.

We think, construing the language of the statute, in connection with the apparent object and intent of the legislature, and the mischief they intended to prevent, that the meaning is apparent; that if on a trial the defendant is entitled to the property, he shall have a judgment for a return; and if, through the fault of

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the plaintiff, either by bringing a defective suit, or by abandoning it voluntarily, or through failure to comply with the rules and orders of the court, the suit is determined against the plaintiff, without a trial, so that the defendant has no opportunity to show his right, then the plaintiff shall be adjudged to restore the property to the possession of the defendant, from whom he replevied it.

The action of replevin, as an adversary suit to try the title to personal property, was adopted in some of the other states earlier than here, and the general features of our statute are like those of Connecticut and Maine, especially of the latter state. The Connecticut statute provides, that "if the plaintiff fails to make out a title to the goods replevied, there shall be a judgment for a return. In *Fleet v. Lockwood*, 17 Conn. 233, the defendant pleaded in abatement of the action, the want of a bond for securing costs, the plaintiff being a non-resident of the state, and the plea was sustained, and the suit abated, and it was held that the defendant was entitled to a judgment for a return.

The Maine statute is, "that if it shall appear upon the non-suit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return," &c.

In *Greeley v. Courier*, 39 Maine 516, the writ of replevin was abated on motion of the defendant, for a defect in the replevin bond, and on motion of the defendant, judgment was rendered for a return.

The plaintiff insists, also, that the county court erred in rendering a judgment for a return in favor of the defendants, without proof of their title, or right to have the property restored, and especially that there was error in the county court, in refusing to allow the plaintiff to contest the right of the defendants to a return, by evidence that he was the owner of the property.

In the case cited from Connecticut, judgment for a return was rendered on the abatement of the suit, without any evidence, though it was argued, that the plaintiff had not, in the language of their statute, *failed to make out a title* to the property, because that question had not been tried. But the court said that by

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bringing a defective suit, it was the plaintiff's fault that the title could not be tried, and that therefore he should restore the property, and place the defendant *in statu quo*, and then, if he chose, bring a new action. The opinion of the court in this case is referred to as a clear and sound exposition of the nature, object, and course of proceeding, in this species of replevin.

In the above case of *Greely v. Currier*, from Maine, after the writ had been abated the defendant moved for a judgment for return, which the plaintiff resisted, claiming that the defendant was not entitled to have such judgment, except on proof of his title, and offering, as here, to prove his own title; the court excluded the evidence, and gave a judgment for a return. It was argued there, as here, that the words, "*if it shall appear,*" &c., in the statute, were equivalent to saying, *if it shall appear by evidence*. RICE, J., who delivered the opinion of the court, on this point, said, "How shall it be 'made to appear?' Clearly not by the production of testimony, when the plaintiff is out of court. That would authorize a party to try a question of title before the court without a writ, and without a bond, which the defendant has a right to have tried by jury after a sufficient bond has been filed, and legal service made of the writ. It did appear from this fact, that the property had been taken without legal authority, and that the defendant was entitled to a return." It is not claimed that the Maine statute differs at all from ours, so far as regards the defendant's right to a judgment for a return without evidence, or the plaintiff's right to contest it by evidence; so that this case is precisely to the point.

The object of the plaintiff in an action of replevin of this character, is to obtain possession of the property, and establish his right to retain it, and it would be singular that when his action turns out to be so defective, or irregular, that the court dismiss or abate it, he should be allowed to proceed with his evidence and establish his title, and thus have the same benefit and advantage, as if his suit had been regular, and on trial determined in his favor.

It is also objected by the plaintiff, that if the defendant would entitle himself to a judgment for a return, his right to the property ought to be set out in a formal plea or avowry, even if the

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same can not be traversed or tried. But the decisions seem to be otherwise. In the case cited from Connecticut, the plea in abatement contained no prayer for a return, nor was any written plea or motion for a return filed, and it was held none was necessary. In *Greely v. Currier*, after the writ was abated, the defendant filed a motion for a return, and this was held sufficient. The same was held in *McArthur v. Lane*, 15 Maine 245. It has not been claimed that a judgment for a return of the property to the defendant, under the circumstances of this case, would be conclusive of the title, so that the plaintiff could not after a return, bring another action of replevin for it, or any other appropriate action to try his title. The authorities seem to be clear, that the effect of such judgment, when the case is not tried on the merits, is only to restore possession to the defendant.

It is manifest, from the nature of the case, that this must be so. The judgment for the return is a mere incident of the principal judgment, which makes a determination of the cause. When that is upon trial, and upon the merits, so as to be conclusive, then the judgment for a return is of the same character.

If the judgment for the defendant is merely in abatement, or of that character, it is only an end of that particular action, and no bar to the commencement of another for the same cause, and if such judgment be followed by a judgment for a return, it is of the same character.

But the plaintiff says that it may be, that he is unable to return the property upon this judgment, and if so, that the defendant may follow up his judgment for a return, by a writ of return, and a writ of reprisal, and thereby he may be made to pay the value of the property, and, in effect, such judgment will become conclusive. These provisions in the statute in relation to the writ of return, and writ of reprisal, and the proceedings under them, were evidently drawn to meet cases, where the judgment for a return was upon the merits. Whether they can be resorted to in a case where the judgment is not so, but of a merely *interlocutory* character, need not be now determined, as

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such question is not before us for decision. If it should be held that they do apply, and the result be that the plaintiff, by an unfortunate mistake in his suit, becomes embarrassed by the result, it would only prove, that some further legislation is needed to make this branch of replevin do exact justice in all cases.

It is agreed that the defendant needs no such judgment for his protection, that he has a full remedy on the replevin bond, or by resorting to a new action himself, to regain the property, or damages for taking and detaining it from him.

It seems clear, that in order to entitle the defendant to any remedy on the bond, for not returning the property, he must first have a judgment for a return.

That is the very language of the condition of the bond, "to return the property, in case such shall be the final judgment."

In *Pettygrove v. Hoyt et al.*, 11 Maine 66, it was decided that in an action on such a bond, the plaintiff had no remedy for not returning the property, unless he had obtained a judgment for a return. The correctness of this decision can not be doubted. And the suit may be dismissed or abated for the reason, that there is no bond, when the defendant can have no such remedy. Nor would it be just to compel the defendant to resort to a suit to regain possession of property, which had been taken from him by process so irregular, that the title could not be tried upon it. We are satisfied that none of the objections to the proceedings of the county court in giving a judgment for a return, are valid, and that the judgment was so far correct.

But the defendants insist that they were also entitled to have a judgment for damages; that the plaintiff, while in possession of the sheep replevied, had taken the fleeces from them, and that the defendants were entitled to a judgment in damages for the value of the wool. The county court denied this motion, and to this the defendants except. In arguing this question the defendants' counsel proceed upon the basis that the judgment for a return is conclusive of the title, and that, as it has been decided that the defendants own the sheep, they are also entitled to have

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pay for the wool. It is just here that the mistake is in the reasoning: it has not been decided that the defendants own the property, only that as it was irregularly taken out of their possession, the possession shall be restored to them. The disputed question of title is still undecided. It is not denied by the defendants' counsel that a judgment for damages would be conclusive, and they can suggest no mode by which, if the plaintiff is compelled to pay such judgment, he can ever be entitled to recover it back, even if in another action he should establish his title to the sheep. It is clear to our judgment, that such a consequence should not follow from the failure of his suit for a mere irregularity.

There seems, too, to be a difficulty in trying such a question, upon evidence, after the suit is ended. In the case above cited from Maine, *McArthur v. Lane*, after the writ was abated, the defendant moved for a return, which was ordered to be made. The defendant also claimed a judgment for damages, but this the court refused to allow. The court said: "no damages can be allowed, as there is no issue upon which they can be estimated."

There exists the same difficulty in this case, and there is something strangely incongruous, in rendering a final judgment for damages against a party for taking property, the title to which is disputed, where the same has not been settled, and the party is still at full liberty to litigate the title.

The subject has been fully discussed, as to what remedy the defendants have, to recover their damages, which they are clearly entitled to, in case they have the right to hold the sheep. This question is not presented, so that it need be decided here.

In this particular case, there would not seem to me any good reason why the defendants might not have their remedy on the bond for not returning the wool, which was a part of the sheep, when replevied by the plaintiff. However this may be, if the defendants were legally entitled to hold the sheep and the wool, no doubt is expressed by their counsel that they can maintain some action at law to recover it, and although it is said they might fail to get satisfaction by reason of the want of ability in

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the plaintiff to respond to the judgment, we think, they should rather incur that risk, than that they should have a final judgment for it, while the question of ownership is unsettled.

The judgment is affirmed, but as both parties excepted, and neither party has prevailed on his exceptions, no costs are allowed in this court.

B. FAIRCHILD AND LYMAN BURGESS v. LINUS BASCOMB AND
OTHERS, heirs of ELIZA B. CLARK, deceased.

*Evidence. Experts. Insanity. Will. Guardian. Probate
Court.*

It seems that physicians in general practice, and nurses accustomed to attend the sick, are *experts*, in respect to the mental capacity of sick persons.
ALDIS, J.

Therefore, upon the trial of the question of the insanity of a testatrix, it *seems* it would be proper to describe to such a physician or nurse the symptoms and condition of the testatrix, when the will was executed, as disclosed by testimony, and to ask the witness what measure of mental capacity such a person would, in his opinion, possess, at so short an interval before death as that which elapsed between the execution of the will and the death of the testatrix. ALDIS, J.

But *it seems* that a physician who for more than thirty years has devoted his attention almost exclusively to the treatment of insane persons, would not be an *expert* whose testimony in reply to such an inquiry would be competent, because the inquiry relates to the mental capacity of a person not previously insane, but in an enfeebled physical condition of long duration, and just about to die. ALDIS, J.

In a trial involving the question of the sanity of a person, a medical witness who has heard the testimony, may give his opinion as to such person's sanity or insanity, as indicated by any given state of facts, so long as such facts are warranted by the evidence, and are not conflicting.

But where facts on one side conflict with facts on the other, they ought not to be incorporated in one question, but the attention of the witness should

be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it.

Therefore, in a trial involving the question of the sanity of a testatrix, the testimony on the opposite sides as to her sanity being very conflicting, the following question, put to an expert on the subject of insanity, was held to be improper, as involving so many facts that the witness would be obliged, in order to answer it, to settle in his own mind other disputed facts disclosed in the testimony; in other words, to assume the province of the jury. The question was as follows: "*If the facts stated by the witnesses on the part of the defence touching the physical condition of the testatrix and her symptoms and conduct, are true, and the testimony of the witnesses on the part of the plaintiffs, relating to her conduct, is also true, what, in your opinion, was the mental condition of the testatrix in respect to sanity or insanity, at the time of the execution of the will?*"

It is not proper to inquire of a medical expert whether the person in question possessed sufficient mental capacity to transact business, or to make a will. The question should be so framed as to require the witness to state the degree of such person's intelligence or incapacity, in the best way he can.

A witness having been examined in respect to the sanity of the testatrix, it was held competent for the other side to show, as affecting the degree of credit to be given the witness, that a year previous to the trial, the witness had a severe disease of the brain, and that it had affected his mind.

When a witness upon cross-examination is inquired of in respect to a new subject, not connected with any matter for which his evidence was offered by the party introducing him, the cross-examining party can not contradict the reply of the witness to such inquiry.

Upon the question of the validity of a will, as relating to the sanity of the testatrix, or undue influence upon her, it is competent to show that she had brothers and sisters who were poor, for whom she cherished feelings of affection, and of whose poverty she was aware, and yet made no provision for them in her will; and also that the sole legatee, her brother, was known to her to be intemperate.

Held, also, that it was competent to show that for four years before the execution of the will, during a great portion of every year, her conduct, habits, and conversation were strange, unnatural, and different from what they were during the previous years of her life.

The false statements of the sole legatee, as to the execution and contents of the will, *held* admissible, as having some tendency to show undue influence by him upon the testatrix.

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The testatrix, shortly before her death, made application to have her guardian removed. The justices of the peace appointed to examine into the necessity of a guardian, made their examination, but did not make their report till after the death of the testatrix. Upon the filing of their report, the probate court decreed that the guardian be discharged. *Held*, that such report and decree were void, and not admissible in evidence.

APPEAL from the decision of the probate court, disallowing an instrument presented for probate as the last will of Eliza B. Clark.

The defences set up in the plea were: *first*, That the instrument in question was not the last will of the said Eliza B. Clark; *secondly*, insanity; and *thirdly*, weakness of intellect, and undue influence.

The cause was tried by the jury, at the April Term, 1861, PIERPOINT, J., presiding.

The instrument in question was dated November 14th, 1858, and purported to dispose of the entire estate, (amounting, as the testimony tended to show, to some \$7,000 or \$8,000,) of the testatrix, to her brother, John W. Bascomb, she being a widow, and leaving no issue. By the alleged will, the plaintiffs were appointed executors.

After proof by the plaintiffs of the formal execution of the instrument, the defendants offered testimony to prove that, besides the said legatee, the testatrix had at the time of the execution of the instrument several brothers, and had also several sisters; that two of these brothers and two of the sisters were in destitute circumstances, each having several children; that the testatrix always entertained towards her brothers and sisters last mentioned feelings of friendship and affection, and was aware of their pecuniary condition. To this testimony the plaintiffs objected, but the objection was overruled and the testimony admitted, substantially in accordance with the offer.

The defendants also offered testimony to show that for about four years previous to the death of the testatrix, her conduct, habits, and conversation were, during a great portion of the time every year, strange and unnatural, and different from what they were during the previous years of her life. This testimony was objected to by the plaintiffs as extending back to a period

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too remote ; but it was admitted by the court, as tending to show insanity at the time of making the will, and several witnesses testified to her conduct during such period, tending to show the testatrix's insanity.

The testimony on both sides tended to show that the testatrix was about fifty-four years old when she died ; that she was a woman of feeble constitution, and that she declined gradually in physical health for many years before she died ; that for four years or more previous to her death, she was afflicted with pulmonary disease, nervous derangement, and general debility ; that at eight or nine o'clock on the morning of her death, she was very low physically, and much worse than she had been for some days before, and continued sinking gradually until about two o'clock in the afternoon, when she died ; and that she executed the will at about fifteen minutes before twelve o'clock of the day of her death.

Dr. William H. Rockwell was present in court during the examination of the witnesses, and heard the entire testimony on both sides.

After the plaintiffs had put in their opening testimony, and the defendants had put in all their other testimony relating in any way to the mental or physical condition of the testatrix, and before the introduction of the plaintiffs' rebutting testimony, the defendants called Dr. Rockwell as a witness, and he testified that he was by education and profession a physician and surgeon ; that for more than thirty years prior to that time he had devoted his attention almost exclusively to the treatment of patients suffering from mental maladies ; that during the past twenty-five years he had been the superintending physician of the Vermont Asylum for the Insane at Brattleboro, and that during that time he had had under his charge, as such physician, between 3,000 and 4,000 insane patients. The defendants then inquired of this witness as follows :

" Suppose a woman to die at the age of about fifty-four years ; that she had been for fifteen years before her death in slender health, and for four years before afflicted with pulmonary disease, nervous derangement, and general debility ; that she should at eight or nine o'clock in the morning before her

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death be found very low physically, and considerably worse than she had been for days before ; that she should continue worse and gradually sinking until she died at two o'clock in the afternoon ; would she, in your opinion, possess sufficient mental capacity at a quarter before twelve o'clock to transact business ?”

This question was objected to by the plaintiffs, but the objection was overruled, and the witness answered that he thought it possible that she might be capable of disposing of her property, but it would be a great exception to the general rule if she was. The answer was also objected to.

The defendants then put the following question to the witness :

“ If the symptoms and indications testified to by the other witnesses in this case with reference to Mrs. Clark are proved, and if the jury are satisfied of the truth of them, was she in your opinion sane or insane during the time that these symptoms and indications took place ? and if insane, what was the nature and character of that insanity ? What state of mind did those symptoms and indications indicate ? And what would you expect would be her conduct during that time, with reference to the disposition of her property ?”

This also was objected to by the plaintiffs, but the court overruled the objection, and the witness answered, “ that he should think she was insane on two subjects—viz., as to her property, and as to living or dying.”

The defendants then inquired of the witness as follows :

“ If she was insane during the period of time that the symptoms spoken of were occurring, what would be the probability of her recovery ?”

This question was objected to by the plaintiffs, but the objection was overruled, and the witness answered, that “ the probability of recovery in cases of insanity depended considerably upon the length of time the patient has been insane. That about twenty-five per cent of those, who have been insane one year, recover. Not over ten per cent. of those, who have been insane two years, recover, and that where insanity has existed for over three years, it is a rare thing for the patient to recover.”

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This question was then put to the witness by the defendants :

"Judging from the facts stated by the witnesses, if true, how long, in your opinion, was Mrs. Clark insane before her death?"

The plaintiffs objected to the question, but the court allowed the witness to answer, and he replied that, "in his opinion, she was insane from the time Dr. Hathaway first visited her in August, 1854, until her death."

The defendants then inquired of the witness :

"Judging from the facts and circumstances detailed by the witnesses touching Mrs. Clark's health, symptoms and conduct, if the jury should find them to be true, what was her mental condition as to sanity or insanity at the time of the execution of the will, November 14th, 1858?"

The plaintiffs objected to this question, but the objection was overruled, and the witness said that he should think she was insane.

The defendants then inquired of the witness as follows :

"In the mental condition that you think Mrs. Clark was in, if the testimony is true, would her mental disease be always perceptible?"

The plaintiffs objected to the question, but the court allowed it to be put, and the witness replied, that "it would, if she was conversed with upon the subject on which he thought her to be insane." The court, also, against the objection of the plaintiffs, allowed this witness to testify as to the character of Ray's Medical Jurisprudence of Insanity, and of _____ on Insanity, as books of authority on the subjects of which they treat, and the witness testified that they were works of good authority on that subject. He also, on cross-examination, testified that certain medical books which were produced and shown to him by the plaintiffs, were works of good authority on the subject of insanity. During the argument to the jury, the plaintiff's counsel read some passages from the medical books whose character they had proved by Dr. R., and the defendants' counsel also read, without objection, some passages from Ray's Medical Jurisprudence of Insanity.

The only witnesses examined on the part of the plaintiffs,

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relative to Mrs. Clark's mental symptoms, or to the condition of her mind in respect to sanity or insanity or imbecility, were Messrs. Adams, Johnson, Berkley, Fairchild, Hill, Lincoln, Russell, Ranslow, Smith and Seger, and after all the other testimony having any bearing on the question of the soundness or unsoundness of her mind, on both sides of the case, had been put in, the defendants again called Dr. Rockwell, and put to him the following question:

"If the facts stated by the witnesses on the part of the defence touching the physical condition of Mrs. Clark and her symptoms and conduct are true, and the testimony of Ranslow, Adams, Smith, Johnson, Seger, Fairchild, Hill, Berkley, Russell and Lincoln, relating to her conduct, is also true, what, in your opinion, was the mental condition of Mrs. Clark in respect to sanity or insanity at the time of the execution of the will on the 14th of November, 1858?"

To this question the plaintiffs objected, but the court overruled the objection, and the witness testified, that "he still thought she was insane, and that it was impossible to reconcile her conduct as testified to by the defendants' witnesses with the idea of her not being insane at the date of the will."

The defendants also offered testimony tending to show that John W. Bascomb, the legatee, was an intemperate man, and that this was well known to Mrs. Clark. To this the plaintiffs objected, but the objection was overruled, and testimony tending to show the facts offered was received.

The defendants also offered to show that on the day after the decease of Mrs. Clark, John W. Bascomb, the legatee, stated to one of his brothers, (one of the defendants in this suit,) that he (J. W. Bascomb) did not know that Mrs. Clark had made a will, and that in another conversation which he had about a week afterwards with another brother, he, J. W. Bascomb, stated the contents of the will to be different from what they actually were, and considerable less favorably to himself than the fact. This testimony was objected to by the plaintiffs, but was admitted by the court, it appearing by the plaintiffs' own showing that J. W. Bascomb was in the house at the time the will was executed, and knew of its execution.

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Linus Bascomb, one of the defendants, was called as a witness on the part of the defence, to show facts and circumstances bearing on the mental condition of the testatrix prior to and at the time of execution of the instrument in question, and as to his dealings with her and of his connection with her affairs, and testified accordingly. In the course of his examination, he was inquired of, if he was the person who was appointed guardian of Mrs. Clark, and in this connection the defendants produced and offered in evidence a duly certified copy of the record of said Linus' appointment as such guardian. To the introduction of this record the plaintiffs objected, but the same was admitted by the court, to explain and give character to the acts, sayings, and proceedings of the said Linus, as testified to by himself and others, relating to the testatrix and her property, (but the jury were expressly told at the time, and also in the charge, that this evidence, or the fact that a guardian had been appointed over the deceased, was not to have any weight or to be considered by them in determining the question of the testatrix' insanity, that it was not admissible for that purpose,) it having been stated by the plaintiffs' counsel in his opening statement to the jury that the said Linus had by fraud and without the knowledge of the testatrix, procured himself to be appointed guardian, and had unlawfully and improperly interfered with her property during her lifetime, and it having already been shown by the plaintiffs by parol that the said Linus had acted as her guardian, and that proceedings were instituted by her to obtain his removal.

After the examination, without objection, of one Hathaway as a witness for the defendants, the plaintiffs offered to show by one Fairchild, (one of the plaintiffs,) that a year previous to the trial Hathaway had a severe disease of the brain, and that it had affected his mind. This was objected to by the defendants and excluded.

Hector Adams, a witness introduced by the plaintiffs, having testified in chief that he drew a will for Mrs. Clark at her request in July, 1857, was inquired of on cross-examination if that will was not drawn at the request of John W. Bascomb, and if he, the witness, did not so testify in this case before the probate

court at Milton in June, 1859? Both these questions having been answered in the negative, the defendants offered to show that Adams did testify before the probate court that he drew the will in July, 1857, at the request of J. W. Bascomb. To this testimony the plaintiffs objected, but the same was admitted. The plaintiffs also offered the report of the justices appointed by the probate court upon Mrs. Clark's application for the removal of her guardian, to inquire into the subject of such application; also the record of the decree of the probate court, (both made after the death of Mrs. Clark.) discharging such guardian. These were objected to by the defendants and excluded.

To all the above rulings of the court the plaintiffs excepted. No exceptions were taken to the charge of the court.

H. B. Smith and George F. Edmunds, for the plaintiffs.

J. French and E. R. Hard, for the defendants.

ALDIS, J. The more important points, raised upon the argument, were as to the questions put to Dr. Rockwell as a professional witness in regard to the insanity of the testatrix.

There is no question but that in this case the opinion of an expert was admissible upon the question of insanity; and that such a witness might testify as to the nature and symptoms of insanity and monomania; and as to the facts proved by other witnesses tending to show insanity, whether they, if true, did or did not indicate partial or total insanity,—whether they indicated a state of continuous insanity, or one with lucid intervals occurring;—and whether the facts proved by other witnesses tending to show the deceased to have been sane during the same period, were reconcilable with the idea of insanity, and might have existed as proven, and yet the party exhibiting such apparent manifestations of sanity have at the time been insane. It is precisely in regard to such matters that the skill of an expert is needed. So too it is not questioned that the witness might and ought to have stated the grounds of his opinion,—for the value of such opinions depends greatly upon the good sense and accuracy of the reasons given for them.

Neither is it claimed that the expert had the right to give any opinion upon the evidence—or as to the preponderance of evidence—or whether the facts submitted to him for his opinion were or were not true.

Neither, we think, can it now be questioned that hypothetical questions may be put to such a witness, when the hypothesis supposes a state of facts proved, or which may be fairly claimed to be proved by the evidence of other witnesses. Such has been the practice in this State. It is the practice in other States and in England; and it is a matter of convenience and often of necessity. But the plaintiff objected to the first and last questions put to Dr. Rockwell, upon several grounds which we will now consider.

I. It is claimed that the subject, to which the first question pointed, is not a matter of professional science and skill,—that it is one upon which the opinion of an unprofessional person is just as good as that of a physician;—that it was not an inquiry as to symptoms indicating insanity, but as to the effect of pulmonary disease, nervous derangement and general debility upon the mental capacity of a person of sound mind.

On the part of the defendants it is claimed that the facts stated in the question related directly to the insanity of the person.

The question does not present the case of an insane person, but of one who has been sick with “pulmonary disease, nervous derangement and general debility.” The phrase “nervous derangement” is claimed as indicating insanity. It attends insanity, but often exists where persons are of sound mind. The words, as used in the question and interpreted by the context, preclude the idea that that nervous derangement was meant which amounts to insanity.

The question therefore only supposes the case of a sick woman of *sound mind*, who for four years had been sick with pulmonary disease, nervous derangement and general debility, who on a given day is very low, grows worse, gradually sinks and dies at 2 P. M.; and, upon this state of facts, inquires whether at two hours before death she would possess sufficient mental capacity to transact business. The question is not whether the disease would produce derangement of the mind at two hours before

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death ; but whether by the progress of that disease as indicated by the symptoms stated, her mental capacity would become so impaired or enfeebled that she would not have mind enough left to transact common business.

Persons who are much accustomed to attend upon the sick—to watch the progress of diseases to their end and to be with the dying, are by their experience enabled to form a better judgment as to the course of disease and its probable effect upon the body and mind in the last hours of life than others who have no such opportunity. Physicians who are in general practice and nurses thus become experts in such matters, so far as experience and observation can furnish knowledge. In some diseases there is a much greater uniformity in their effect upon the mind and in the symptoms which immediately precede death, than in others. Thus in apoplexy, inflammation of the brain and other acute diseases directly affecting that organ, the physician would expect disturbance or destruction of the mental powers throughout the sickness and without intermission up to the time of death. In others, as in some fevers, the mind might wander throughout the violence of the fever, but upon its abatement and for a short time before death be restored to clearness and strength. Doubtless in by far the greatest number of maladies the mind is usually but little if at all affected by disease, and the most skilful physician is wholly unable to tell beforehand how long the sick man will retain his faculties and whether he will or will not have his reason to the last. But it can not be questioned after all that large experience and observation in such matters enable one to judge better than ordinary observers as to the indications of specified symptoms and the probable progress and effect of diseases upon the mind, and to determine what diseases and what symptoms indicate such effects, and what do not.

We think therefore that whether “pulmonary disease, nervous derangement and general debility” would, in the progress of the disease as indicated by the facts stated in the question impair the mental powers at two hours before death, is a matter upon which the opinion of a physician, accustomed to attend such cases to their termination, might properly be admitted in evidence. Few persons without the aid of the knowledge derived from phy-

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sicians and nurses would be able to form an opinion on the subject. In most cases, however, there is so little uniformity in the effects of diseases upon the mind just before death that the mere opinion of a physician as to the matter would obviously be evidence greatly inferior in value to the actual observation of an intelligent bystander.

It is further objected that the witness was an expert only upon the subject of insanity, and that this was an inquiry as to a disease as to which it was not shown that Dr. Rockwell had the skill and knowledge which would make him an expert. It is plain that the professional witness can be allowed to give his opinion only upon those very matters in which he is shown to have special knowledge and skill. As to all other matters he stands in the position of ordinary witnesses, who are not allowed to give their opinion upon facts proved by other evidence.

The People v. Rector, 19 Wend. 576; *C. J. Tindal in Ramadge v. Ryan*, 9 Bing. 838; *Rambler v. Tryon*, 7 Serg. & R. 90; *Dunham's Appeal*, 27 Conn. 192; *Heald v. Thing*, 45 Maine 392.

It appears from the case that Dr. Rockwell was by education and profession a physician and surgeon, and that for more than thirty years he had devoted his attention almost exclusively to the treatment of patients suffering from mental maladies.

When a physician thus devotes himself to a specialty in his profession, it is obvious that his skill and knowledge in those departments of his profession which he does not practice, must be much less than those of physicians who do study and practice in them, and be of but little value as a guide to unprofessional persons. Especially is this to be considered, when as in this case, the inquiry is as to the effect of disease in its last stages in impairing the mental powers of persons of sound mind, when it would seem that the witness could have had little or no experience or practice in ordinary diseases affecting such persons; and no evidence appears to have been given that he in fact had ever treated the disease in question, or observed its effects in its last stages upon persons of sound mind. The mere fact that a person was by education a physician, if he had not practised his profession, we should not deem sufficient to justify his admission as an ex-

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part. So if he devoted himself exclusively to one branch of his profession and had had no practical experience in that subject matter to which he was called to testify—as if an oculist was called to testify about insanity—we should not deem him admissible. We feel that such considerations have much force in regard to this inquiry put to Dr. Rockwell, and the effect of his answer to it upon this case. As the case must be opened upon other grounds we do not pass upon this point.

II. It is said that the facts assumed to be true in the last question put to Dr. R. could not all be true:—that the evidence was conflicting. We have examined such minutes of the testimony as have been furnished us, though they are not the Judge's minutes and are imperfect.

The plaintiff's testimony tends to show that Mrs. Clark was sane, had correct ideas as to the amount and disposition of her property, and this up to the time she made her will.

The defendant's testimony tends to show she was insane, and especially in regard to her property. But none of the plaintiff's witnesses were present upon the occasions testified to by the witnesses for the defence—nor were any of the defendant's witnesses present upon the occasion, testified to by the plaintiff's witnesses. It is possible therefore that all the facts to which they testified on both sides may have been true; although it is somewhat difficult to believe that the same woman, at periods of time near to each other, when talking upon the same subject,—her property,—and that the subject on which she is alleged to have been insane, should have talked to one set of witnesses rationally and to the other wildly and insanely. It is possible that she might have been insane, and yet while talking with the plaintiffs' witnesses have appeared sane, or sane, and have appeared insane to the defendants' witnesses. Hence the hypothesis of the question may be true. But if all the facts so testified to on both sides are true, then the opinion that Mrs. Clark was insane must rest upon the ground that the *indicia* of sanity were consistent and reconcilable with her being insane at the very time. It was proper for the witness to give his opinion on this point; to state from his knowledge how deranged persons assume the appearance of sanity even when talking upon the

subject upon which they are insane ; and from what motives or causes, and to what extent and under what circumstances, they will so appear, and how likely this is to happen. He might point out why the manifestations of sanity might not be conclusive as to her being sane, and how and why such appearances might be reconcilable with her insanity.

It is claimed that the question went further and demanded of him an opinion upon the whole case equivalent to the finding of a verdict by the jury.

The question supposed that the whole evidence bearing upon the issue of insanity on both sides was true. and, upon the whole case thus summed up, asked him to give his opinion as to her mental condition. It is obvious that this is all that a jury could do, upon that basis. It is saying not only that the facts tending to show her sane *may* be accounted for and reconciled with the idea of her being insane, but that they are reasonably to be so accounted for. The answer of the witness shows this : "I think her insane, for it is impossible to reconcile her conduct as testified to by defendants' witnesses with the idea of her not being insane at the time of the will ;" that is, that the evidence to show her insane is so strong that he considers it conclusive on the point—preponderates decidedly over the evidence to show her sane ; and that the proofs for the plaintiffs' must be accounted for as consistent with her insanity, as the other evidence can not be reconciled with her sanity. It seems to us to be really asking the witness for his opinion as to the preponderance of the evidence. A recurrence to the evidence seems to us to make this obvious. The plaintiffs' evidence tended to show that but a short time before her death she retained counsel and instituted proceedings to remove Linus Bascomb from the guardianship which she claimed he had got by fraud. In these consultations with her counsel and in her examination at the inquest as a witness upon the subject of her property and her relations to her brothers in regard to it—points upon which she is claimed to have been insane. she is said to have testified correctly and rationally and to have shown no signs of insanity, and to have so continued sane to the time of her will and her death. The defendants' evidence was that her condition at the inquest was fair, but that

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John W. Bascomb stood near her when testifying and shook his head at her and expressed his feelings in other ways. It is obvious that the defendants would claim as a fair inference from this evidence that John W. Bascomb's influence upon her at the inquest, and in regard to the litigation, made her appear sane at and about that time; and thus these different appearances of Mrs. Clark could be reconciled, and yet she be insane. But this would of course be contested by the plaintiffs. Now Dr. Rockwell's answer to the question goes upon the hypothesis that the appearances of sanity were true and yet reconcilable with insanity. How reconcilable? He does not say. But it seems to us that the witness in order to so reconcile them, must have determined in his own mind that she was influenced to assume a sane appearance by John W. Bascomb from the motive to thereby prevail in the litigation with Linus. And thus the question involved the necessity of the witness finding a controverted fact in order to reconcile conflicting evidence and give his professional opinion. This was not permissible to the witness, it was only for the jury.

Upon the question, whether a medical witness called to hear the testimony and to testify, may give his opinion, upon the facts testified to by other witnesses, as to the insanity of the party, the authorities do not seem to be agreed.

In *The Commonwealth v. Rogers*, 7 Met. 500; SHAW, CH. J., seems to consider such an opinion admissible; yet this decision is accompanied with the caution that the witness is not to judge of the truth of the facts testified to by others.

In *The People v. Lake*, 12 N. Y. 358, HAND, J., suggests that the witness ought not to give such general opinion upon the case. He says, "Before the questions upon matters of science can arise, the witness must determine in his own mind upon the truth of the evidence which he has heard; which is not a matter of science but of fact for the jury. But he may be asked whether such and such appearances were symptoms of insanity, and whether such a fact, if it exist, is or is not an indication of insanity. Upon principle it may be doubted whether, strictly, medical witnesses should ever give an opinion upon the general question of the sanity or insanity of a prisoner, as that is a ques-

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tion for the jury." The decision of that case did not turn upon that point; and it may be observed that the authorities cited do not seem fully to sustain the opinion expressed. In *Norman v. Wells*, 17 Wend. 161, Judge Cowan remarks, "I know that in questions of insanity some courts allow witnesses to throw in their opinions from what they have seen and heard. But I always found that such cases were much better tried where opinions were kept entirely out of view; and I have generally excluded them *except where they came from professional men*." He cites from *Folks v. Chad*, 3 Doug. 157, the language of Lord Mansfield that the opinions of scientific men, deduced from facts which are not disputed, are admissible. In *Mayor of N. Y. v. Pentz*, 24 Wend. 672, Senator Verplanck in a very admirable opinion recognizes the admissibility of such evidence, upon the ground that "scientific opinion is in fact testimony to a law of nature."

In Massachusetts the earlier decisions do not disagree with the opinion of SHAW, CH. J., in Rogers' case.

In *Hathorn v. King*, 8 Mass. 371, the facts were in some respects like the case at bar. The scrivener was called in at 11 A. M. The testatrix was then very low, continued sinking till 6 P. M., when she made the will, and died at a quarter past 8 o'clock in the evening. The opinion of her attending physicians as to the soundness of her mind, founded upon circumstances and symptoms they observed, were held admissible. No other question was presented by the case.

In *Dickinson v. Barber*, 9 Mass. 227, the depositions of medical men stating opinions but *no facts* were rejected. The Court observed that "the opinions of professional gentlemen are not to be received as evidence unless predicated upon facts testified either by them or by others."

The case of *Davis v. Mason*, 4 Pick. 156, may be referred to as illustrating the ground upon which the opinions of experts upon the point at issue are admitted. The question was whether certain heaps of stones and marked trees were monuments of boundaries. A skilful surveyor testified to their appearance. He was then asked his opinion whether they were or were not boundaries. This was objected to as matter solely for the jury.

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The Court held the opinion competent evidence, because by long experience he had acquired skill in determining the question submitted to him. The witness might have told how heaps of stones and marked trees, designed as monuments of boundaries, usually appear and then have described the appearance of these, and then have stopped without giving his opinion. But the opinion of a skilful person, founded upon facts seen by himself, often embodies the result of facts and observations which it is difficult to describe, and which can in no way be so satisfactorily and naturally expressed as by giving his opinion. But when the facts are stated by another, there seems to be less reason and necessity for stating opinion merely; as all the facts stated to the witness can be by him stated singly or together, with the effect which they ought to have, as proofs, upon the issue.

In *The U. S. v. McGlue*, 1 Curtis, C. C. R. 1, physicians were not allowed to give their opinions upon the case, but only upon known or hypothetical states of fact warranted by the evidence; because, says the learned judge, "the case, on which any one might give his opinion, might not be the case which the jury, upon the evidence, would find.

In *Spear v. Richardson*, 37 N. H. 24, the court hold that the true rule and uniform practice in New Hampshire is that the expert may not give his opinion upon the case, as shown upon the proof; but may upon a state of facts, such as the evidence tends to establish, hypothetically stated.

In *Buffum v. Harris*, 5 D. T. 248, the experts gave their opinions upon the point at issue, but founded upon their own knowledge of facts and upon facts stated by others. The question was as to the percolation of water through the soil from a spring—the experts knowing the soil and having knowledge as to the percolation of water through different soils, and assuming other material facts hypothetically.

In England the following authorities bear upon the question. *Rex v. Wright*, 1 Russ. & Ryan, 466, is a Crown case reserved for the consideration of the twelve judges, in which "several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz: whether from the other testimony given in the case the act was

in his opinion an act of insanity." Such a question, in that case, was just equivalent to asking the opinion of the witness upon the testimony as to the mental condition of the prisoner.

In *Gills v. Brown*, 9 Carr. & Payne, a case of collision upon the Thames, a sea captain was not allowed to say whether the conduct of the captain of the brig was right; but his opinion was obtained by asking him what was the duty of a captain under certain specified circumstances.

In *Malton v. Nesbit*, 1 Carr. & Payne 70, case for negligence in managing a vessel—the plaintiff's counsel wished to ask the witness, whether, supposing the facts proved to have occurred, they showed negligence in the captain. Scarlett objected. ABBOTT, CH. J., held that the plaintiff's counsel might state to the witness what had been done, and might ask him if an officer of competent skill would have done so.

In *Fenwich v. Bell*, 1 C. & K. 312, a case of collision, this question was allowed: "whether, if the facts proved by the plaintiff be true, he was of opinion that a collision could have been avoided by proper care on the part of the defendants."

In *Jameson v. Drinkald*, 12 Moore 157, the witness may state to what cause the accident is attributable, but not whether the fault was on one side or the other.

In this state, in *Lester v. Pittsford*, 7 Vt. 158, Judge PHELPS says, where mere opinion is required upon a given state of facts, that opinion is to be derived from professional men.

In *Morse v. Crawford*, 17 Vt. 500, it is held as well settled in this state that a witness not a professional man, may give his opinion touching the insanity of a party, when it is founded upon facts within his own knowledge.

In Greenleaf on Evidence § 440, the author thus sums up the present state of the law on this subject: "The opinions of medical men are constantly admitted as to the sane or insane state of a person's mind, as collected from a number of circumstances, though founded not on personal observation, but on the case itself, as proved by other witnesses on the trial. They can not give their opinions as to the general merits of the cause, but only upon the facts proved. And if the facts are doubtful, and remain to be found by the jury, it has been held improper to ask

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an expert, who has heard the evidence, what is his opinion upon the case on trial ; though he may be asked his opinion upon a similar case, hypothetically stated."

A study of the various cases will show that the form of the question is modified and shaped by the courts ; whether it states facts, or puts facts hypothetically, or refers to the testimony of witnesses as being true ; so as to give the witness no occasion or opportunity to decide upon the evidence, or mingle his own opinion of the facts, as shown by the evidence, with the facts upon which he is to express a professional opinion. This is the important point, and to secure this, various forms of inquiry have been adopted. Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions, though hypothetical, are as clearly improper, as if they directly sought the opinion of the witness on the merits of the case. Hence, in framing such questions, care should be taken not to involve so much, or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer. Such, as we have already intimated, was the error of the last question put to Dr. Rockwell.

We have no doubt that a medical witness who has heard the testimony, may give his opinion, as to the sanity or insanity of a party, as indicated by any given state of facts, so long as such facts are warranted by the evidence, and are not conflicting. In some cases all the facts bearing on the issue might be summed up in a single question. But when facts on one side conflict with facts on the other, they ought not to be incorporated in one question, but the attention of the witness should be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. Then the jury can know all the facts and grounds on which the opinion is based.

III. What is sufficient capacity to transact business, or to make a will, is a matter of law, depending somewhat upon the nature of the business. A witness may not correctly apprehend the rule of law, and if he uses such expressions may be misled

himself, or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter; or, to use Judge RUFFIN's expression in *Crowell v. Kirk*, 3 Dev. 358, to state the degree of intelligence or imbecility "in the best way he can."

IV. We think the evidence to show that Hathaway's mind was still affected by a severe disease of the brain he had had a year previous, was admissible, as tending to show that his memory and his judgment, (both of which were in question,) were less to be relied upon than if he possessed full mental health and vigor. It was admissible, as affecting the degree of credit to be given to him.

V. The question put to Hector Adams, whether he did not draw Mrs. Clark's will in 1857 at the request of John Bascomb, was an inquiry not connected with any matter for which his evidence was introduced by the plaintiff. It was a new subject of inquiry, for the benefit of the defendants, and upon which Adams became their witness, and his evidence on that point could not be impeached by them. Hence the testimony as to his declarations before the probate court should have been rejected.

VI. That the testatrix had brothers and sisters who were poor, for whom she cherished feelings of affection, and of whose poverty she was aware, were important elements in considering what would be the natural and reasonable disposition of her property by will, and the evidence to show these facts was properly admitted.

So the evidence to show that her brother, the legatee in the will, was intemperate, and this well known to the testatrix, was admissible, as tending to show that a bequest of all her property to him was not an act to have been naturally expected of her.

VII. Testimony to show that, for four years before her death, during a great portion of every year her conduct, habits, and conversation were strange, unnatural, and different from what

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they were during the previous years of her life, tended to show her insane continuously, and up to the time of her death.

VIII. The false statements of John W. Bascomb as to the execution and contents of the will—he being the sole legatee—were properly admitted. They impress the mind with the idea that he professed ignorance as to the will, to shield himself from the suspicion of having used undue influence to procure it. Why should he do this, if there was nothing to conceal?

IX. The report of the justices, and the decree of the probate court, were both made after the death of Mrs. Clark. The inquest was had upon her application. By her death there was no prosecuting party in court, and the proceedings and the guardianship were at an end. The guardian was not bound to resist the acceptance of the report, or the making of the decree. What would have been the final report and decree if she had lived—what objections would have been made, and might have prevailed, as to the report, we can not now tell, for before her death the proceedings had not been perfected, and after her death they could not be. We think the making of the report and the decree after her death must be deemed void and of no effect against the defendants, and their exclusion as evidence was right. In the authorities cited we find none which sustain a report or decree similar to these.

Judgment of the county court reversed, and case remanded for a new trial.

Davis v. Richmond.

REUBEN DAVIS v. LORENZO RICHMOND.*

Process. Service. False Return. Officer. Return.

The service of process by an officer of this state by leaving a copy thereof in another state, is invalid; and notice so given may be entirely disregarded.

If an officer's return of the service of process is headed with the name of the state and a particular county, the various acts of service which his return sets forth, unless specifically mentioned as performed elsewhere, will be construed as alleged to have been performed in the county named at the head of the return.

Therefore, where a return, headed with the name of this state and one of its counties, stated that a copy of a petition of foreclosure was left with D., one of the defendants in the process, and no place was specified where such process was left with D., and in fact it was delivered to him by the defendant, a Vermont sheriff, in the state of New Hampshire, and D. did not appear in the cause, and a decree of foreclosure was taken against him, without any continuance of the cause, and a short time fixed for redemption, upon the expiration of which without payment, the tenant of D., then in possession of the premises, was ousted by virtue of the decree; *held*, that D. could maintain an action against the sheriff for making a false return.

CASE against the defendant for making a false return, as sheriff of Windsor county, upon a petition for foreclosure, placed in his hands for service.

The facts of the case are sufficiently stated in the opinion of the court.

The defendant pleaded the general issue, and the cause was tried by the court, at the December Term, 1861, BARRETT, J., presiding.

The county court rendered judgment for the defendant, to which the plaintiff excepted.

D. T. Chase, for the plaintiff.

Converse & French, for the defendant.

* This cause was decided at the February Term, 1862, in Windsor county, but the papers in the case were not received by the reporter in season to include it among the cases of that term.

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PECK, J. In this case, which is an action on the case against the defendant, as sheriff of Windsor county, for a false return of service of a process of foreclosure in chancery, in which the plaintiff in this suit was one of the defendants, the question is, *first*, whether, upon the facts stated in the exceptions, the return is in fact false, and if so, then *secondly*, whether it is false in a particular operating to the injury of the plaintiff in this action, and resulting in such damages to him as will sustain an action.

The bill of foreclosure was in favor of Edmund Weston, and returnable to the Orange County Court of Chancery, June Term, 1860. Smith and Olds and one Manchester were co-defendants with Davis, the plaintiff in this suit. All the defendants in that process resided in Windsor county, except Davis, who resided in Cornish, in the state of New Hampshire. The premises, sought to be foreclosed by that bill, were situate in Hartford, in Windsor county, and were in possession of said Manchester, as tenant of Davis, the plaintiff in this suit, Davis having an equity of redemption in the premises, by virtue of a levy of an execution subsequent to the mortgage above mentioned, and subsequent to two other mortgages, one to said Smith and one to said Olds. The bill and subpoena in chancery appear by the case to have been regularly served by this defendant Richmond on all the defendants therein, except Davis, in Windsor county; and, as to Davis, the case shows that the only service that was made on him was by a true and attested copy of the bill and subpoena left by the defendant Richmond at Davis' dwelling house in Cornish, New Hampshire, on the 14th day of June, 1860. There is no pretence but that the service on Davis was seasonable, and the return true in respect to the time when it was made.

The first question is whether the service on Davis in New Hampshire was valid—whether the sheriff could make a legal or valid service out of this state. It is very clear that the sheriff had no official character and no authority as sheriff under that process in New Hampshire, and that the service made by him there was, as an official act, unauthorized and void. It is true he was sheriff at home in his own state, but in New Hampshire he was no more than any private person, and the leaving of the

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copy at Davis' dwelling house in Cornish, New Hampshire, had no more effect as a service or notice than if it had been left by any private person to whom it was not directed, and it gave the court no jurisdiction of Davis, or authority to render a decree against him in the cause. The court by such service acquired no jurisdiction of Davis, as the service was in fact made, and the court upon such service, if truly returned upon the process, could not have proceeded to render a decree in that cause binding upon Davis, in the absence of an appearance on his part. The acquiring of jurisdiction of a party who resides out of the state, and upon whom no service is made within the state, is matter of strict law, and the mode of proceeding prescribed by the statute and practice of the court must be at least substantially followed. The statute provides that in suits in chancery the clerk may issue an order of notice, whereby notice may be given by publication of the substance of the bill, together with the order, in a public newspaper,—a chancellor may issue the order instead of the clerk, or, in analogy to the statute providing for giving such notice in suits at law, the notice may be given under an order of court, made after the cause is entered. It is claimed by the defendant's counsel that, as the defendant had actual notice and an opportunity to appear in the cause, he can not claim that he has been damnified. This is a good answer to the alleged defect of the return of the officer upon the copy, arising from its being written in pencil instead of ink, but the service, being made in New Hampshire, out of the state where the process issued and was returnable, was for that cause invalid, and Davis was not bound to notice it, or to appear in obedience to the process—and this ground of complaint on the part of the plaintiff is not waived by his neglect to appear. He had a right to suppose the officer would return the facts truly, and that the court would refuse to proceed upon such service.

But it is insisted by the defendant's counsel that whether the service was legal or not, is immaterial; that the question is whether the return is true, and that the plaintiff can not recover unless he shows that the return is false in fact. It is true the action is not for making an illegal or defective return, but for making a false return, and the plaintiff can not recover unless

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he shows the return false. The only materiality of the question whether the service in New Hampshire was legal, is in reference to its effect on the question whether the particular in which the plaintiff claims the return was false, was material to his rights or operated to his injury. If the service made in New Hampshire is as good and valid as if made in Windsor county, within the precinct of the officer, then it is indifferent to this plaintiff whether the return states the service to have been made in the one place or the other, as the legal effect would have been the same. It would be the same as if a sheriff should serve a writ in one town in his county and date it as made in another town in the same county; both towns being within the precinct of the sheriff, the error in the return would be immaterial, and would not sustain an action. But in this case, the service in New Hampshire being invalid and not such as would have authorized the court to proceed to a decree against this plaintiff, if the sheriff has returned on the process that he made the service in Windsor county, where it would be legal, it is material.

The next question is, whether the return is false in this particular. This involves the construction of the return as made upon the process and returned to the court. The return commences: "State of Vermont, Windsor county ss. At Hartford, in said county, on the 13th day of June, 1860, I made service of this petition and subpœna on the within John Smith, by leaving a true and attested copy," &c.—then proceeding in usual form, it then states that on the same day, at said Hartford, he made service on the within named Denison Manchester by delivering to him a true and attested copy thereof, with his return thereon endorsed. It then states that on the same day, in Norwich, in said county, he made service on F. L. & E. W. Olds, by delivering each of them a true and attested copy, with this return endorsed on each of said copies. Then follow these words—"On the 14th day of June aforesaid, I delivered to the within named Reuben Davis a true and attested copy of this petition and subpœna, with my return thereon endorsed."

If the legal construction and intendment of this return is that, as to the service on Davis, it is to be referred to no place as there made, then the return is not false in the particular

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complained of. The defendant's counsel claim, that as the sheriff specifies the town in said county in which he made service on each of the other defendants in the process, and omits it in stating the service on Davis, such is the construction, and therefore the return is not false. The sheriff having commenced his return by stating the state and county, it was unnecessary to name the particular town in which he made the service on any of the defendants; the whole would be referred to the county thus named as the venue, and in order to have the return show upon its face that the service was made in such state and county, it would not be necessary to again name either, or the town in which the service was made. Naming in the body of the return, as in this case, the particular town in the county in which the service was made on the other defendants, and omitting to do so as to Davis, does not change the construction or legal intendment as to the place where service was made on him. The only construction that can be put upon the return is, that the service was made on Davis, as well as on the others, in Windsor county,—so that the return showed a legal return on Davis, and such service as warranted the court, on the faith of it, in proceeding and entering a decree against him, while the service, as actually made, had the facts been truly stated as to the place of service, would have been a nullity, and would have given the court no authority to make such decree.

If, then, the plaintiff in this case has suffered any damage by this error in the return, he is entitled to recover. It appears that a decree was taken against this plaintiff and the other defendants in that cause, at the June Term, 1860, the term at which the process was returnable. Thus the defendant, by reason of this error in the return, had a decree against him at least one term sooner than a decree could have been obtained, had the sheriff returned truly the place where service was made, as in that case the only way to have obtained a decree against Davis in that suit, would have been by a continuance of the cause to the next term, and by a notification by publication for the usual length of time to Davis, under an order of court. This of itself shows sufficient damage to sustain the action. It differs in no way from the common case of an officer making

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return of legal service, when in fact no service was made, and a judgment taken on the faith of it. The pretended service is no service. But it appears, on reference to the decree, that the time fixed for the payment of the first instalment was thirty days from the 11th July, 1860, the date of the decree, and that that time passed without payment. Weston, the orator in that suit, took possession of the premises the next day, thus ousting Manchester, the tenant of this plaintiff. This clearly shows such damage as will sustain this action.

It is claimed by the defendant's counsel that the amount of the mortgages on the premises, which constituted a lien prior to Davis' levy, was more than the value of the premises. Whether this is so or not does not necessarily appear, as the appraisal made at the time of the plaintiff's levy is not conclusive of the value at the date of the decree, but if the fact is as the defendant's counsel claim, it may affect the amount of the recovery, but can not defeat the action.

The judgment of the county court is reversed, and the case remanded.

JOSEPH BRADISH v. ALONZO REDWAY.

Audita Querela. Appeal. Justice of the Peace. Petition.

If, in a suit before a justice of the peace, not otherwise appealable, in which the defendant has pleaded the authority of a court in justification, the justice refuses to allow an appeal from his judgment, *audita querela* will not lie to set aside such judgment.

The remedy of the aggrieved party in such a case is by petition to the county court under chapter 36, section 8, Comp. Stat. (Gen. Stat. p. 334, sec. 7.)

AUDITA QUERELA to set aside the judgment of a justice of the peace in favor of the defendant against the plaintiff, on the ground that an appeal from such judgment was improperly denied the plaintiff. Plea, not guilty, and trial by the court, at

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the March Term, 1862, in Washington county, KELLOGG, J., presiding.

The action in which the judgment, sought to be vacated, was rendered, was trespass in favor of the defendant against the plaintiff, for taking a trunk and fiddle. The *ad damnum* in the writ in that action was ten dollars, and the defendant claimed on trial damages only to the amount of eight dollars and ninety cents, for which sum judgment was rendered in his favor. In that action the plaintiff (then defendant) put in a plea of justification for such trespass, that he took the property in question as sheriff, by virtue of a writ of replevin, in favor of one Wood against the defendant. It appeared that there was great irregularity in the mode of service of such replevin by the plaintiff, both in the appraisal of the property replevied and in the neglect to take a bond from the plaintiff in the replevin action, as required by statute, and that the writ of replevin was never returned by the plaintiff, to the court to which it was made returnable.

After judgment had been rendered for Redway in the trespass action, and within the proper time, the plaintiff asked to be allowed an appeal, but the justice of the peace refused to allow the same. On the trial of this action the plaintiff introduced the testimony of his attorney, tending to show that the above mentioned plea of justification was pleaded by him in good faith.

Upon the foregoing facts the county court found that such plea of justification was pleaded by Bradish in the action of trespass in good faith, and decided that therefore that action was appealable, and rendered judgment for the plaintiff, to which the defendant excepted.

O. H. Smith, for the defendant.

Wing, Lund & Taylor, for the plaintiff.

PIERPOINT, J. This is an *audita querela* brought to set aside a judgment of a justice of the peace, rendered against the plaintiff in this proceeding, on the ground that an appeal was

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improperly denied him. Neither the plaintiff's writ, nor his claim in the proceeding before the justice come within the statute so as to make the case appealable, but it is insisted that the plea which the defendant in that suit filed as a defence was of such a nature as to bring the case within the provision of the statute allowing appeals in such cases, when such plea is filed in good faith. Whether in this instance the plea was filed in good faith or not, the magistrate must determine before granting or denying the appeal. He denied the appeal. Whether his judgment in the matter is to be regarded as conclusive or not, is a question we do not now determine. But we are all of the opinion that in a case of this kind *audita querela* is not a proper remedy. In *Tyler v. Lathrop*, 5 Vt. 170, *audita querela* was held to be a proper remedy to set aside a judgment when the magistrate rendering the judgment had illegally denied an appeal. The case upon its face was appealable, and the statute gave the right absolutely, and the magistrate had no discretion or judgment to exercise in the matter.

That case has since been followed, but with reluctance, and, if the question were now an open one, probably a different rule would be adopted. This court has said in following that case, that they would not extend the rule therein laid down, but in cases of this character would confine its application to cases "precisely identical;" *Spear v. Flint*, 17 Vt. 499; *Harriman v. Swift*, 31 Vt. 385.

We are inclined to this strictness from the consideration that the proceedings by *audita querela* are harsh, and often unjust in their operation. The party has his judgment vacated, his security destroyed, if he has any, and he is involved in costs, without remedy, and this independently of the merits of his claim; while the other party has an ample remedy by petition under the statute, where the rights of both parties are fully secured and protected, and a new trial granted if the party is entitled to it, and the merits of the claims finally adjusted and determined. To that remedy, we think, the plaintiff in this case should have resorted, and to that we are inclined to leave him.

The judgment of the county court is reversed, and judgment rendered for the defendant for his cost.

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SYLVESTER HENRY v. SEYMOUR SHELDON.

Attachment. Execution. Tools. Machinery.

A machine for shaving and splitting leather, operated either by hand, steam, or water, costing \$250, and weighing from six hundred to nine hundred pounds, operated by turning a crank, and, when worked by hand, requiring two men to work it, and which had to be fastened to the floor by cleats when in operation, *held* not to be exempt from attachment and execution as a *tool* necessary for upholding life.

TROVER for "one iron and steel splitting machine." Plea, not guilty, with notice of special matter in defence, and trial by jury at the March Term, 1862, KELLOGG, J., presiding.

On trial, both parties claimed title to the property mentioned in the declaration under one V. R. Blush,—the plaintiff claiming under a sale thereof made by Blush to him for a valuable consideration, and the defendant claiming by a purchase of it at an auction sale of property sold on an execution in favor of one Cross against Blush. It was conceded that the machine, after the sale thereof by Blush to the plaintiff, remained in Blush's possession, in his tannery at Waterbury, as it did before the sale, up to the time when it was taken and sold by the officer as the property of Blush on the execution. The plaintiff claimed that the machine, when owned by Blush, was exempt from attachment as his property, and that, consequently, the sale of it by Blush to the plaintiff was valid as against the creditors of Blush without any change of possession.

The testimony introduced in relation to this splitting machine, tended to show that it was used for shaving or splitting leather, and was operated by hand, steam or water, and had been used by Blush in his tannery in each of these three ways; that it cost \$250 when new, and weighed from six to nine hundred pounds; that it had two knives and two rollers, and was operated by turning a crank, and the leather passed between the knives and the rollers, and that when it was used or operated by hand, it took two men to work it; that it was not fastened permanently to the building, but could be moved about wherever it was wanted; that it was usual to fasten it to the floor by boards or cleats when in use to prevent its sliding, but not to fasten it

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to the floor or building with bolts, or permanently; that such machines have taken the place of the old-fashioned way of shaving leather by hand, and have been in use for fifty years or more; and that Blush, at the time when he sold this machine to the plaintiff, was a tanner and currier, and followed no other trade or business.

The defendant admitted that he took the machine and held it before and at the time of the commencement of this suit, claiming title to it as aforesaid, and that he had refused to deliver it to the plaintiff, although the plaintiff had demanded the same of him while he thus held it.

On these facts in relation to the machine, the court ruled, and so instructed the jury, that it was not exempt by law from attachment as the property of Blush at the time when it was sold by him to the plaintiff. To this ruling and instruction the plaintiff excepted.

L. Henry, for the plaintiff.

Dillingham & Durant, for the defendant.

PECK, J. This is trover for an iron and steel splitting machine, as it is called in the exceptions. The plaintiff bought the property for a valuable consideration of one Blush, a tanner and currier, who carried on the business of his trade. The plaintiff took no possession of it, but left it in the possession of Blush, in his shop, where it remained until it was afterwards levied upon and sold by virtue of an execution against Blush, in favor of one Cross. The defendant's title is by purchase at the sheriff's sale on that execution. The only question in the case is whether the property was exempt from attachment; whether it is a kind of property which the statute exempts from attachment and execution. If it is, there was no necessity of any change of possession in order to put the property beyond the reach of attachment and levy by the creditors of Blush.

It appears that the machine was used for shaving or splitting leather, operated by hand, by steam, or by water power, and that Blush had used it in each of these ways. It cost \$250, and

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weighed from six to nine hundred pounds, had two knives and two rollers, and was operated by turning a crank, and when operated by hand, it required two men to work it. It was kept in its place by cleats, and was movable from place to place in the shop.

It also appears that such machines have taken the place of the old mode of shaving leather by hand, and have been in use fifty years or more.

There is no claim that this property comes within any of the articles of property exempt by law, unless it is a *tool*, within the meaning of the statute. In *Kilburn v. Demming*, 2 Vt. 404, the word *tool* in the statute was construed as applying to simple instruments, ordinarily used in manual labor, and not as embracing machinery, or an article that is usually denominated a machine. It was there decided that a spinning billy and jenny which cost about \$100, and was operated by the owner by hand, and which the owner transported from place to place, and used wherever he could find employment, was not exempt from attachment. That case, so far as any decisions have been since made, has been followed, and must be decisive of this case, unless we put a different construction upon this clause of the statute. It is true the tendency of the more recent decisions upon some parts of this statute has been towards what may seem to be a more liberal interpretation in favor of the debtor. For instance, where the statute does not define the amount of property to be exempted, but leaves it to be measured by what may be deemed necessary, as in case of household furniture, courts might allow a greater quantity to the debtor than would have been exempt in the early history of the state; but if so, it is not from applying a different rule of interpretation, but by interpreting the word *necessary*, in reference to the existing habits and customs of the people. But still, in order to be exempt under this clause of the statute, the article must be such as can be fairly denominated household furniture. So of other clauses of the statute, the property, in order to be exempt, must be of the *kind* or *class* mentioned in the statute, however convenient it may be for the debtor.

The article in question in this case, it is true, takes the place

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of a tool that is exempt, but that is not sufficient, as the reason is true of almost all machinery, however expensive and complicated. If the introduction of machinery to supersede the use of tools has produced such change in the mode of labor as to render it expedient to protect from attachment articles of the class to which the one in question belongs, it is for the legislature, and not for the court, to provide the remedy.

The ruling of the county court was correct, and the judgment is affirmed.

W. R. LOVEJOY & CO. v. J. S. LEE AND TRUSTEE N. C. BACON.

Attachment. Bank Bills. Trustee Process. Commissioner. Practice. Duress. Officer. Recovery of Money Illegally Retained.

When a commissioner is appointed in a trustee case, the whole case as to the liability of the trustee is referred, and when the commissioner professes to report the facts, and makes no reference to the disclosure as containing further facts, the statements in the disclosure can not be regarded by the court.

Bank bills may be attached upon *mesne process*.

Coin, bank bills or money, which have been attached on *mesne process*, and remain in the attaching officer's hands after the settlement of the suit, may be again attached by trusteeing the officer.

Quere, whether a debtor, who has, at the request of an officer having a writ of attachment against his property, and with knowledge that the officer desires to make an attachment thereon, unlocked a drawer in his house containing bank bills belonging to him, has not so far put the officer within reach and control of the bills, as to deprive himself of the right to seize them while the officer is in the act of taking them, and thereby to defeat the attachment. PECK, J.

But if the officer treats such bills as attached by him, and the debtor acquiesces therein, the officer will, after the dissolution of the attachment by the settlement of the suit, be held as the trustee of the owner of the bills.

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An officer, who had made an attachment of bank bills, refused to return them to the owner upon the dissolution of the attachment, unless the owner would agree that he might retain a part of them, as a pretended reward for the finding of them by the officer. *Held*, that such agreement was compulsory upon the debtor and not binding, and that he might recover the money so retained, or upon evidence that he elected to avoid the agreement, it might be attached in a suit against him by trusteeing the officer.

Quere, whether it could not be so attached without any such evidence?

TRUSTEE PROCESS. The cause was referred to a commissioner, as to the liability of the trustee, who reported the following facts :

The defendant Lee, being largely in debt and insolvent, shortly previous to the attachment hereinafter mentioned, claimed that he had lost \$2500 in bank bills, and publicly offered a reward for finding the same, but there was great reason to doubt whether any such loss occurred, and to believe that the claim and advertisement were merely a pretence to enable Lee to effect a compromise with his creditors. The trustee Bacon, who was a deputy sheriff, attached, upon a writ against Lee placed in his hands for service, six hundred dollars in bank bills, under the following circumstances :

These bills and a bag of specie were in a bureau drawer in Lee's house, which drawer was locked. This drawer was unlocked by Lee or his wife, at Bacon's request, in the presence of the three. Lee and his wife both knew for what purpose Bacon was there. Each of these three persons scrambled for the contents of the drawer. Lee grasped the bag of specie. His wife first got possession of the roll of bank bills, but Bacon seized and took them from her, and kept them until the suit was settled, as mentioned below. Shortly afterwards the suit on which this attachment was made was settled by Lee, whereupon Bacon refused to surrender to Lee the bank bills which he had attached, until Lee signed a paper acknowledging that Bacon had found and paid to him six hundred dollars of the money which he had lost and advertised a reward for, and that he had paid Bacon the proper proportion of the reward he had offered for the discovery of all the money. Bacon retained fifty dollars of the money, which he claimed to

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hold as a reasonable share of the reward for finding the six hundred dollars in bank bills ; but in fact he found no money of Lee's, except in the manner above detailed. Lee was induced to sign the paper above described, not only by the fact that Bacon was an officer of the law, and held the six hundred dollars by attachment, but also by the fact that another officer with a writ against Lee had come into the house, and was clamoring at the door for admittance, while Bacon held the money and was refusing to surrender it until Lee should sign such paper. Lee was desirous to conceal from the public the fact that he had this money, and he and Bacon so understood when Lee executed the above mentioned paper to Bacon. Bacon claimed to have a right to retain, and did retain up to the hearing before the commissioner, the fifty dollars which he reserved out of the six hundred dollars he attached, by virtue of the paper executed to him by Lee as above mentioned. Lee, up to the hearing before the commissioner, never made any claim on Bacon for the fifty dollars retained by him, and had no interest in it, except that, if the plaintiff should not recover it of Bacon, Lee was to pay the plaintiff one-quarter of that amount in cash.

Upon these facts the county court, at the March Term, 1862, in Washington county, KELLOGG, J., presiding, adjudged the trustee chargeable for fifty dollars and the interest thereon from the time of the execution of the paper above described from Lee to Bacon, to which the trustee excepted.

Peck & Colby and B. F. Fifield, for the trustee.

Redfield & Gleason, for the plaintiffs.

PECK, J. The only questions in this case arise upon the report of the commissioner, as to the liability of the trustee. The commissioner reports the facts, and submits the questions of law to the court.

A question is made whether the written disclosure of the trustee filed in the case is to be regarded as part of the case in connection with the report. Under the present statute the whole case, as to the liability of the trustee, is referred, and the disclosure previously filed is but evidence on the hearing before

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the commissioner, and when the commissioner professes to report the facts, and makes no reference to the disclosure, as containing further facts, the court can take no notice of statements in the disclosure not embraced in the report. Such is the present case, and we must look to the report for the facts. This question is, however, of no importance in this case, as we see nothing in the disclosure that would vary the rights of the parties, certainly nothing that puts the legal rights of the trustee in a light more favorable to him than that in which they are presented by the report.

It appears that the alleged trustee, Bacon, was a deputy sheriff, and had in his hands for service a writ of attachment in favor of Lee, the principal debtor, and served it by attaching \$600 in bank bills, together with some other property; that Lee immediately, and before the return day of the writ, settled the suit with the attorneys who commenced it, and that Bacon, being notified of the settlement, paid over to Lee the bank bills attached except \$50, which he retained when this trustee writ was served upon him, and which he still retains. The question is whether Bacon is chargeable as trustee of Lee for that \$50.

I. It is insisted that as this money came into the hands of the trustee officially under an attachment, it is in the custody of the law, and not subject to attachment by trustee process, even after the first attachment is dissolved. Had this been personal property other than money, no one would doubt but it would have been liable to be attached by an ordinary writ of attachment. This being so, it is difficult to see why this fund may not be held by trustee process, which is but another mode of attaching the debtor's property. By the settlement of that suit the lien of that creditor was gone, and the right of the debtor to the property became absolute, both as to title and possession.

It is settled in this state that a deputy sheriff who has money in his hands which he has collected on an execution may be held as the trustee of the execution creditor. This was decided in *Hurlbut v. Hicks and Trustee*, 17 Vt. 193; and in *Bullard v. Hicks and Trustee*, 17 Vt. 198. On the same principle such officer must be liable as trustee of the execution debtor for a

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surplus in his hands belonging to the debtor, realized on the sale of the property of such debtor, and which it is his duty to pay over to the debtor. If such funds are not so far in the custody of the law as to be exempt from trustee process, it is very clear that money of the debtor attached on mesne process is not for this reason exempt, after that attachment is dissolved by settlement of the suit, and notice given to the attaching officer.

II. It is also objected by the counsel for the trustee, that Lee's remedy against Bacon for the money is founded on a trespass or tort, and that therefore Bacon can not be held as trustee. It is claimed to be a tort on the ground that bank bills are not attachable on a writ of attachment, and that for this reason Bacon was guilty of a trespass when he attached the bills. The statute provides that goods, chattels and estate may be attached on a writ of attachment. Goods and chattels in a strict technical sense may not include money or bank bills; yet in a statute, will, contract, or other instrument, the words goods and chattels are construed to include money and bank bills, if such appears to be the intent. There are many instances where these words have been so construed. This question was discussed in *Prentiss v. Bliss*, 4 Vt. 513, where the officer collected an execution in bills of the bank of Burlington, and in a suit in favor of the execution creditor for not paying over the money, the officer set up in defence that the bank bills were attached on a writ of attachment against the execution creditor in a suit still pending. This case arose when we had no special provision in the statute on the subject, and yet it is evident from the language of the court, that, had it been necessary to decide the point, the court were prepared to hold that bank bills were attachable, and might be levied upon by execution. The court turned the case on the point that the identical bills collected by the officer on the execution did not become the property of the execution creditor till paid to him by the officer, and therefore while thus in the hands of the officer they were not attachable as the property of such creditor. The statute now provides for levying an execution on current coin and bank bills. But it is claimed that, as the statute is silent on the subject of such attachment on a writ,

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bank bills are not attachable on *mesne* process. We think coin and bank bills would be attachable and subject to levy of execution, in the absence of any special statutory provision on the subject, other than the general provision in relation to goods and chattels. It is true the statute provides for the levy of execution on coin and bank bills, and does not in terms provide for attaching them on *mesne* process. As a general rule, whatever may be taken in execution is subject to attachment on *mesne* process, and we do not think the legislature intended to make an exception in this respect in relation to bank bills and coin. It may be that one object of this provision of the statute was to remove all doubt as to the right to attach and levy upon such property; but it is obvious that the principal object of the statute was to prescribe the mode of proceeding when levied upon, as it provides that coin may be paid over to the creditor without the formality of a sale, and so of bank bills, "if he (the creditor) will receive them;" otherwise they shall be sold as "other chattels," thus designating bank bills as chattels. This special provision rather *recognizes*, than *creates* the right to attach and levy on current coin and bank bills. If the statute is construed to subject bank bills to levy of execution, and not to attachment on *mesne* process, the same construction must apply to current coin, which obviously was not the intention.

But it is further insisted that Bacon was a trespasser, for the reason that in making the attachment he took the bills forcibly from the hands of the debtor or his wife, against their will. It is true that personal property usually carried or worn about the person, can not be attached when so worn about the person of the debtor that the officer can not attach it without committing an assault and violating the personal security of the debtor. But it appears that the officer was lawfully in Lee's house, with process against him, for the purpose of making an attachment, and this was known to Lee; that this money, with a bag of specie, was in a bureau drawer, which was locked; that Lee and his wife and the officer went to the drawer, and either Lee or his wife, at the request of the officer, unlocked the drawer; all three scrambled for the contents; Lee grasped the specie, and his wife seized and held the roll of bills, whereupon the

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officer seized the bills and took them from her, Lee attempting to retake them but failed. It is very questionable whether Lee had not gone so far in putting the officer within reach and control of the property as to deprive himself of the right to seize the package of bills while the officer was in the act of taking it into his possession, and thereby to defeat the attachment. If so, the taking of the bills by the officer from the defendant's wife was in the nature of a recapture. In view of this, in connection with the fact that the officer treated it as an attachment, and Lee acquiesced in it as such, we think the officer can not now set up that it was a trespass, in order to shield himself from his liability as trustee.

III. But it is claimed that when Bacon paid over the bank bills to Lee all but the fifty dollars in question, it was agreed between Bacon and Lee that Bacon should have the fifty dollars as a reward for finding the money, Lee having previous to the attachment pretended to have lost the money, and advertised it as lost, offering a reward to any one who should find it. Bacon never found any money of Lee's, otherwise than as already stated in stating the circumstances of the attachment. Lee having settled the attachment with the creditor, claimed the money attached, and Bacon refused to deliver it unless Lee would sign the paper attached to the report, and which is relied on as an agreement that Bacon should retain the fifty dollars, for finding the money. At this time there was another officer at the door about to attach, as the parties supposed, the money in Bacon's hands, and in consequence of this and the fact that Bacon would not give up the money on any other terms, Lee signed the paper, and Bacon delivered over to him five hundred and fifty dollars, and retained the other fifty dollars. The plaintiff claims to charge the trustee on the ground that the fifty dollars was left in Bacon's hands to keep it from attachment. The trustee can not be made chargeable upon this ground. Lee's purpose, undoubtedly, in hastening to get the money out of Bacon's hands was to keep it from attachment, but there is no ground to infer that his intent in leaving the fifty dollars in Bacon's hands was fraudulent in fact, or for the purpose of having Bacon hold it in trust for him, to avoid creditors. The commissioner finds no

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such fact, and, as urged by the counsel for the trustee, every inference is the other way. The trustee is not liable unless Lee could have collected this fifty dollars, notwithstanding such agreement, for we assume there was such agreement in fact as the trustee claims. This assent, payment, or agreement, whatever it may be called, was not voluntary on the part of Lee, but compulsory. The parties did not stand on equal terms, and this trustee knew at the time that Lee acted not willingly, but by compulsion. To allow a public officer to avail himself of the custody of a debtor's property obtained by virtue of process, and, by his refusal to redeliver it after the lien is discharged, to force the debtor to pay money, or to agree that the officer shall retain a portion of the property as his own, under pretence of a claim on the part of the officer, so manifestly unfounded that it must be regarded as set up in bad faith, and then to protect himself under such agreement, is too manifestly unjust and oppressive to be sanctioned as law.

The principle and spirit of the decisions on the subject of voluntary and compulsory payments fully sustain this conclusion. Many of the cases were recently and critically examined in *Beckwith v. Frisbie & Sons*, 32 Vt. 559. In that case, however, the money was paid under protest, but it was a case between private individuals. The law is more strict against oppression by a public officer by means of an advantage obtained in his official capacity.

But it is claimed by the counsel of the trustee that the right to avoid this contract is personal in Lee, and that he only can avoid it. But the fact that Lee has agreed with the plaintiff, in some arrangement in reference to the plaintiff's demand, that the plaintiff should have the benefit of this claim against the trustee, (as is conceded by counsel in explanation of a statement in the report on this subject,) is such an election on the part of Lee to avoid this contract, as obviates this objection, even if otherwise it would prevail.

None of the objections interposed by the trustee can avail him, and the judgment of the county court is affirmed.

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HORATIO NYE v. HENRY MERRIAM.

Fraud. Action. Damages. Evidence. Exemplary Damages.

A fraud unaccompanied by damage is not actionable.

The defendant cheated the plaintiff in weighing some butter sold him by the latter, and reported the false weight to the plaintiff, but afterwards the plaintiff accepted from the defendant his note in payment for the butter, in a sum large enough to cover the contract price of the quantity actually furnished. At the time the note was given the plaintiff had forgotten the weight as originally reported by the defendant. *Held*, that in the absence of proof that the plaintiff had been put to any trouble or expense by the defendant's falsehood, he could not recover therefor.

Evidence that a party at a former trial of a cause claimed, through his counsel, to defend the suit upon grounds wholly inconsistent with his present testimony, is admissible as tending to discredit such testimony.

Exemplary damages are allowable in an action on the case for deceit, when the evidence tends to show that the defendant wilfully purposed to deceive and defraud the plaintiff.

CASE for fraud in cheating in weighing a quantity of butter sold by the plaintiff to the defendant.

The defendant pleaded the general issue, with notice of special matter in defence, and the case was tried by jury at the June Term, 1861, in Orleans county, POLAND, CH. J., presiding.

The plaintiff's evidence tended to prove that about the middle of October, 1858, he sold to the defendant eleven tubs of butter at the price of eighteen and one-half cents per pound, to be delivered by the plaintiff in Barton, the defendant paying the plaintiff \$33 towards the same before the delivery; that about the 1st of November, the plaintiff being away from home, the defendant called for the butter, and the same was carried by the plaintiff's father to the appointed place of delivery, where it was weighed by the defendant, and the weight marked by the defendant on the several tubs, and a list of the weights in figures on a slip of paper given to the plaintiff's father.

The plaintiff gave evidence tending to prove that the defendant when he weighed the tubs full of butter placed his foot under the edge of the platform of the scales, so as to make the

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weight less than the true weight, and, when the empty tubs were weighed, placed his foot upon the edge of the scale, so as to make the tub appear to weigh more than the true weight, and that by these means, the weight of the butter as marked on the tubs, and given to the plaintiff's father, was less than the true weight of the butter, from two to three pounds upon each tub of the butter,—and that this was done designing to cheat and defraud the plaintiff; that immediately after the delivery of the plaintiff's butter, the defendant went to Boston with that and butter purchased by him of various other persons, and there sold the same, but did not return to Barton as was expected, and in the early part of December, information was received by the plaintiff that the defendant was about to proceed to California, without returning to Barton, or paying for the butter he had purchased on credit of the plaintiff and others; that the plaintiff thereupon, for himself and two other persons, of whom the defendant had purchased butter on credit, went in pursuit of the defendant, first to New York city, from there to Boston, and finally to Lebanon, New Hampshire, where he found the defendant, and called on him for payment for the balance due him for his butter, and the two other men for whom he was acting; that the defendant replied that he had no money, and could not pay.

In relation to what took place between the plaintiff and the defendant on this occasion, the plaintiff testified as follows:

"The defendant felt bad because he could not pay me. I said if he could not pay me he must give me his note, as I had nothing to show. He asked how much it was. I told him I did not know, but supposed he could tell. He said he could not, that his papers were in his valise or trunk. I said I supposed it was about sixty dollars; he thought it was fifty-five or sixty dollars. I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented, and gave me his note for sixty dollars, and I came home. I had lost the paper that my father gave me, and did not know what the figures were. There was not a word said between us about fraud in the weight, and no allusion to it whatever."

The defendant's evidence tended to prove that the plaintiff's

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butter was fairly and truly weighed by the defendant, and no such cheat practised in weighing as the plaintiff claimed; that the true weight was marked on the tubs, and that the just balance due to the plaintiff from the defendant for the butter, after payment of the \$38, was \$55.25.

In relation to the transaction between the plaintiff and the defendant, at Lebanon, the defendant testified as follows:

"Last of December, or 1st of January, the plaintiff came to Lebanon, New Hampshire, where I was stopping, said he wanted to settle this butter matter,—wanted the money for his butter. I told him I had not got it. Then he said he wanted my note. We had considerable talk, though the plaintiff was in a hurry. We talked about his following me round. I asked what his object was. He said he wanted to catch me. I asked what he expected to do when he did. He said he did not know,—had made a fool of himself, and was sorry. I asked the plaintiff how much there was. He said he had not got it. I showed him from a memorandum book how much it was. He seemed satisfied. I then brought up the matter of the cheat; said I had understood he had threatened to prosecute me, and I wanted to have it settled, so I could come back to Barton and not have him jumping on to me. I said I would give him my note for \$60 to settle it all up. He said that would be satisfactory, and I gave him my note for \$60, and he left for the cars. The plaintiff said he had been to a good deal of expense, and had been to New York and Boston. The plaintiff asked if my father or brother would not sign the note with me. I told him I should not ask them to do so, for I owed them borrowed money. He said he should go and ask them. I said he could do so, and they could do as they pleased about it."

The defendant also introduced the testimony of several witnesses of admissions by the plaintiff that the note was given to cover and settle not only for the balance due for the butter, but also for his claim for being cheated by the defendant in the weight.

The plaintiff in his rebutting evidence, gave evidence tending to prove that the defendant was present at the trial of this case before the justice, and testified, that at the interview between

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him and the plaintiff at Lebanon, the plaintiff set up no claim that there had been any fraud in the weight of the butter, and that nothing was there said about it, and that Mr. Cooper, the defendant's counsel, in the presence of the defendant, put the defence wholly upon the ground that there was no fraud in the weight, and relied strongly upon the fact that when the plaintiff found the defendant at Lebanon, and took his note, he made no claim of the kind, as evidence that there was no fraud. The defendant's counsel objected to this evidence, so far as it went to show the grounds of defence and argument of Mr. Cooper on behalf of the defendant, but the court admitted the same, to which the defendant excepted.

On the defendant's cross-examination, he was enquired of by the plaintiff's counsel when, and to whom, and for how much he sold his butter in market, how much money he received, how he expended it, and as to his whereabouts from the time he went to Boston with the butter, till he was found by the plaintiff at Lebanon as above stated. The defendant's counsel objected to these inquiries, but they were allowed to be put, and answered by the defendant, to which the defendant excepted.

It was conceded by the plaintiff that before he met the defendant at Lebanon, he had had an intimation that the defendant had cheated him in the weight of the butter, but that he did not know the extent of it, nor the manner in which it was done.

The defendant's evidence tended to prove that prior to the interview at Lebanon, he had received from his family in Barton information that the plaintiff claimed he had cheated in the weight of the butter, and was threatening to prosecute him therefor.

It was conceded, also, that the note the defendant gave the plaintiff had never been paid, and that it was large enough to cover the full value of the butter at its true weight.

The defendant's counsel claimed and requested the court to instruct the jury, that if the defendant was thus guilty of cheating in the weight, still if the note he gave the plaintiff was large enough to cover the full amount of the butter received by the defendant from the plaintiff, at the price per pound agreed, it

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operated as full payment and satisfaction for all the butter, and that the plaintiff therefore was not defrauded, and could not maintain this suit, and that this would be so, whether the matter of the fraud was alluded to at the time of the settlement, or not, and that even if it was as stated by the plaintiff, it would preclude a recovery.

The defendant also requested the court to charge the jury, "that if they found that the reason the plaintiff asked so large a note, and the reason the defendant gave so large a note, was the alleged fraud, although both avoided any discussion of the disagreeable subject, then no right of action accrued."

The court declined so to charge, but did charge the jury that if the plaintiff satisfied them that the defendant purposely cheated in weighing the butter, still if the plaintiff's claim for such fraud was mutually settled and adjusted by the parties, and included in said note, it would be a defence to the action, but that if the note was given merely in settlement of the balance due to the plaintiff for his butter, at its reported weight by the defendant, and with no reference whatever to the plaintiff's having been cheated by the defendant in the weight, then the plaintiff's right of action for such fraud was not thereby barred, even though the note given was large enough to cover the whole of the butter received by the defendant, at the contract price; that if the facts in reference to the settlement and giving of the note were just as stated by the plaintiff, they would not amount to a settlement of the fraud in the weight, if such existed.

The defendant excepted to the refusal to charge as requested, and to the charge as given on this point.

The defendant also claimed that, if there was a fraud in the weight and it was not settled, that the plaintiff could only recover for the deficiency in the weight of the butter caused by such cheat, at its value, or the contract price per pound. But the court charged that if the defendant purposely cheated in the weight, with design to defraud the plaintiff, the jury might give such exemplary damages as they should, under all the circumstances, consider just between the parties.

The defendant excepted to this direction also.

The jury gave a verdict for the plaintiff.

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W. W. Grout and Benj. H. Steele, for the defendant.

J. S. Sartle and T. P. Redfield, for the plaintiff.

ALDIS, J. The jury have found that the defendant attempted to cheat the plaintiff in the weight of his butter ; that he reported the weight to the plaintiff's father, and marked the tubs at from twenty to thirty pounds less than the true weight. The plaintiff was not present when the butter was weighed, and therefore had to rely on the paper the defendant gave his father containing the figures of the weight.

I. If the plaintiff settled with the defendant for the butter upon the basis of the weight as reported by the defendant, and afterwards discovered the fraud, he would, it is admitted, be entitled to recover for the fraud.

II. But the defendant claims that the case, standing on the plaintiff's testimony, shows that the plaintiff has suffered no damage ; that although the defendant may have attempted a fraud, yet in fact he has not accomplished his attempt ; but on the contrary has given his note to the plaintiff on settlement for more than the value of the butter at its true weight and contract price.

To sustain this action there must be *both fraud and damage.* A naked lie that causes no injury to another is not actionable. The lie must be relied upon, and must occasion damage.

The defendant claims, first, that the lie was not relied upon ; and secondly, that it did no damage, according to the plaintiff's own testimony ; and that this view of the case was not presented to the jury. To determine this point we must consider the plaintiff's testimony, and the charge of the court in regard to it.

The plaintiff, hearing that the defendant was about to go to California, and not to return to pay for the butter, went in search of him, and after going to New York and Boston, found the defendant at Lebanon, New Hampshire.

He called on the defendant for payment of the balance due for the butter. The defendant said he had no money. The plaintiff

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replied: "if you can not pay me you must give me your note." "He, the defendant, asked how much it was. I told him I did not know, but supposed he could tell. He said that he could not, that his papers were in his valise. I said I supposed it was about sixty dollars. He thought it was fifty-five or sixty dollars."

It will be noticed that thus far nothing has been asked for by the plaintiff, or spoken of by either, but "payment of the balance due for the butter;" and that what *that balance* was, was what neither could exactly tell,—the plaintiff supposing it "about sixty dollars," and the defendant "fifty-five or sixty dollars." The plaintiff then proceeds: "I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented and gave me his note for sixty dollars." It is admitted that this note was large enough to cover the full amount of the butter at the contract price.

The plaintiff further said that he had lost the paper that his father gave him, and did not know what the figures were.

Now, upon this evidence it is clear that the ~~defendant~~ might justly have urged upon the jury, first, that the note was given solely for the balance due for the butter; that the remark as to his trouble in hunting after the defendant was not intended by him, or understood by the defendant, as making those expenses, or that trouble a part of the consideration of the note, but only as entitling him equitably or morally to have the defendant's doubt whether the balance was fifty-five or sixty dollars, solved in the plaintiff's favor. If given solely for the balance due for the butter, and it covered the whole balance according to true weight and contract price, we are at a loss to see what damage occasioned by the original false statement of the defendant has accrued to the plaintiff. The plaintiff does not appear to have incurred any expense or trouble on account of the falsehood, or to have lost any thing by it. He did not go in search of the defendant on account of it. The attempt to cheat was not consummated by payment or settlement at the lower weight.

Had he known all the facts as to the attempt to cheat, he could not have asked for more than the sixty dollars as the balance due

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him for the butter. Nor does it appear that the falsehood had worked him any injury for which he could have asked for further compensation.

Secondly, the defendant might also have justly insisted that to sustain this action the plaintiff must show that he *relied upon* the false statement in making the settlement.

The testimony of the plaintiff might fairly be claimed by the defendant as tending to show, that the plaintiff could not recollect what the statement originally made by the defendant as to the weight was; that the plaintiff had lost the paper which the defendant gave to his father, and had forgotten its contents; that the defendant could not tell what the weight was, and did not renew or insist on the original falsehood; and that both parties acted on their own knowledge and judgment as to the weight, uninfluenced by the false statement of the weight as originally made.

If the plaintiff did not recollect the false statement,—did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded.

The court in the charge did not present the case to the jury in these two aspects, but seemed to hold that the original falsehood necessarily included damage, and gave a right of action for fraud in weighing, and that, unless such right to sue was discharged in the settlement, it remained in full vigor, and that the plaintiff's testimony did not show it settled. For the reasons above given we think the charge erroneous, and that the judgment must be reversed.

III. The evidence to show that the defendant on the justice trial by his counsel claimed to defend the suit upon grounds wholly inconsistent with his present testimony, was admissible.

IV. The inquiries of the defendant on cross-examination took rather a wide range; but we think we can perceive that such inquiries might be proper, and even necessary, to show fraud, and to invalidate pretences made by the defendant.

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V. When, in an action on the case for deceit, the evidence tends to show that the defendant wilfully and intentionally purposed to deceive and defraud the plaintiff, then exemplary damages for such wilful fraud are allowable. Without adverting particularly to the authorities upon this much discussed point, we deem it sufficient to say that we understand the law ~~to have~~ ~~law to have~~ been long settled in this state, that wilful fraud, as well as malice, may be punished by exemplary damages in an action of tort.

THE TOWN OF CHELSEA v. THE TOWN OF VERSHIRE.

Intoxicating Liquor. Towns. Jail. Pauper.

L. was apprehended and committed to jail in Chelsea under the 22nd section of the act of 1852, to prevent traffic in intoxicating liquors, (Acts of 1852, p. 28,) as having been found intoxicated in the town of Vershire. *Held*, that the town of Chelsea could not, on being notified by the jailer that L. was confined there and in need of relief, pay his board while in jail, and then recover the amount so paid of Vershire, but that if any obligation rested on Vershire to pay for his board while in jail, under that statute, it was a liability directly to the jailer, and not mediately through the town of Chelsea.

CASE under the 22nd section of the act of 1852, entitled "an act to prevent traffic in intoxicating liquors for the purpose of drinking," Acts of 1852, p. 28. The plaintiff claimed to recover for the amount expended for the support, in the jail in Chelsea, of one Lewis, who was committed to that jail by a justice of the peace, under the section above mentioned, as having been found intoxicated in the town of Vershire, and, under the warrant of the justice of the peace, confined there until he disclosed where and of whom he procured the liquor upon which he became intoxicated.

The declaration set forth the record of the proceedings before

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the justice of the peace in respect to the apprehension and commitment of Lewis for being found intoxicated in Vershire, and alleged that Lewis, refusing to disclose where he obtained the liquor, was confined in the jail in Chelsea from the 8th of April, 1858, till the 14th of July, 1858, and that on the day of the commitment of Lewis the keeper of the jail notified the overseer of the poor of Chelsea that Lewis was in that jail, and was in need of relief, whereupon the overseer provided for and supported him in such jail during the whole period of his confinement.

To this declaration the defendant pleaded the general issue, and the cause was tried by the court at the June Term, 1860, in Orange county, BARRETT, J., presiding.

The county court rendered judgment for the plaintiff for the amount expended by the overseer of the poor of Chelsea, for Lewis' support in jail. After the trial and before judgment the defendant interposed a motion in arrest of judgment, on the ground of the insufficiency of the declaration, but the court overruled the motion, to which the defendant excepted.

C. W. Clarke, for the defendant.

Wm. Hebard, for the plaintiff.

POLAND, CH. J. This case has been twice argued, but the court have not yet been able to fully agree upon the points that have been presented by the argument.

There is one view of the case, however, (which has not been taken by the counsel in argument, but which fairly arises under the defendant's motion in arrest,) which we think is decisive. And we are less unwilling to turn this case upon a point not made in argument, than we usually are, because we regard this point as one of considerable practical consequence.

The town of Chelsea claim to recover of Vershire, for supporting Lewis, while in jail, not by any contract, but by force of law; that Lewis was found intoxicated in Vershire, arrested therefor, and, refusing to disclose, &c., was committed to jail in Chelsea, and that being unable to support himself, he was

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supported by Chelsea, and that Vershire is liable to reimburse them for this support, as part of the expense of the proceedings against Lewis.

But the only case where the statute gives an action to one town against another, for support furnished to persons in need, is against the town where such person has a legal settlement. It hardly needs to be repeated, that these rights and remedies between towns, are wholly matters of statute regulation, and are not to be extended or enlarged by construction.

It has not been questioned in this case, but that the expense of supporting Lewis while in jail, was (if he was unable to support himself,) a proper part of the expense of the proceedings, for which Vershire was legally liable.

Whether a person committed to jail under such circumstances, is bound to support himself, if he has the ability to do so, the same as ordinary prisoners, or whether he is to be supported by the town where he is found intoxicated, &c., irrespective of his ability, as the plaintiff's counsel claim, we have no occasion now to decide.

If the town of Vershire were liable for the support of Lewis in jail, we think they were liable directly to the jailer, and there was no occasion for the town of Chelsea to interfere at all.

The precept upon which Lewis was committed, shows that the town of Vershire was the town to be called on, if any town was to be, for his support. By calling upon Chelsea, it could not be expected that town would actually assume the care of feeding him, as they could not remove him to the poor house, or any other place for support, as he must remain in jail.

All they could do, would be to pay the jailer for boarding him, and this could just as readily be done by the town made liable by law. In ordinary cases of needy persons in jail, the jailer is to call on the overseer of the town where the jail is situated, because he has no means of knowing what town is his place of settlement, and the statute throws the duty of ascertaining that fact upon the town, and gives them a remedy over against the place of settlement. Here the process itself shows what town, if any, is to be called on, and as the statute has

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provided for no right or remedies between towns in such cases, we think it must have been intended that the liability should be direct to the person by whom the expense was incurred.

We are of opinion, therefore, that the plaintiff's declaration shows no legal right of action against the defendant.

The judgment of the county court is therefore reversed, and the judgment arrested.

CLARK GALE v. R. BUTLER, JR.

[IN CHANCERY.]

Appeal. Chancery. Costs. Practice.

An appeal from the decree of a chancellor to the supreme court vacates the decree, both as to the merits of the case, and the costs.

When a cause is remanded from the supreme court to the chancellor, it is the latter's duty to conform his decree to the judgment of the supreme court, so far as they have adjudicated the cause; but if no direction has been given as to an incident of the decree, like costs, it is his duty to determine it.

And if in his judgment justice requires that some further proceeding should be allowed in the cause, it is within the chancellor's power to allow it to be had.

POLAND, CH. J. The orator in this case has appealed from the decree made by the chancellor, apportioning the costs of the cause between the parties, claiming that the decree should have been in his favor for his full costs.

As we understand the case, the orator originally obtained a

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decree in his favor to the full extent he claimed in his bill, and for his costs, and the defendant appealed from that decree. The supreme court held that the orator was entitled to have a decree as to one portion of his claim, but was not entitled to a decree upon another, and the larger part, and for which he had obtained a decree. The supreme court therefore reversed the decree of the chancellor, and remanded the case, with directions to enter a decree for the orator for a part of his claim only, but the mandate contained no directions as to what should be the decree as to the costs.

The chancellor directed the costs to be apportioned upon the basis that the orator should recover all his costs, made in prosecuting that part of his case upon which he ultimately prevailed, but denying him his costs made in attempting to enforce the claim in which he had failed, and allowing the defendant, against the orator, his costs made in defending against the same. This was manifestly the just and equitable rule between the parties, and the orator does not claim the contrary, or even that the court should revise it at all, provided the chancellor had any power to apportion the costs.

But the orator claims that as he obtained a decree for all his costs originally, and the mandate from the supreme court gave no direction as to costs, the former decree remained untouched, and in force, as to costs, and that the chancellor could not, on the case being remanded, proceed to vary the former decree as to the costs; that he had no legal authority so to do.

This objection is manifestly without any just foundation. The appeal from the original decree vacated and annulled it, as much as an appeal vacates the judgment of a justice of the peace, and the decree for costs equally with the decree on the merits. If this were not so, the reversal of the decree in the supreme court would have that effect, so that it cannot properly be said that the decree as to costs remains in force. As the supreme court gave no direction to the chancellor as to how he should decree costs, the defendant could with more show of reason claim that none should be allowed, than the orator, that he retained the old decree for the whole.

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In all such cases, when a decree is reversed, and the case remanded, with directions to enter a different decree upon the merits, and no directions given as to how costs shall be decreed, it is understood the chancellor is to decree costs according to equity, in his sound discretion, and as may be just in the altered state of the decree on the merits. It is not unusual, in such cases, in returning cases in this condition, to leave the question of costs untouched, as a chancellor can generally better ascertain and determine what is just and equitable in that respect, than can the supreme court sitting *in banc* to hear it on appeal. The notion, that on the remand of a case from the supreme court, the power and duty of a chancellor over the case is a mere ministerial one, to register the mandate of the supreme court, and that he has no other, is quite too narrow. It is his duty to conform his decree to the judgment of the supreme court, so far as they have adjudged, but if no direction has been given as to an incident of the decree, like the costs, it is his duty to determine it.

So if in his judgment justice requires that some further proceeding should be allowed in the case, it is within his power to allow it to be had, as was decided by this court at the last general term, in *Barker & Haight et al. v. Vermont Central R. R. Co. et al.*

Decree affirmed.

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JOSEPH BRADISH v. THE STATE OF VERMONT.

Petition for New Trial. Practice. Judgment. State. State's Attorney. Cumulative Evidence.

A judgment is considered as rendered on the last day of the term of the court.

Under the statute requiring a petition for a new trial to be brought within two years next after the rendition of the original judgment, such time is to be computed from the last day of the term at which the judgment is rendered.

In petitions for new trial where the state is the petitioner, service of the petition should be made upon the state's attorney of the county in which the petition is pending.

It seems, that if the petition be served upon the attorney who was counsel for the state in the original action, the service will be sufficient.

In a petition for a new trial, it is sufficient if the petition be sworn to by the party really in interest as petitioner, though not the nominal petitioner.

In a petition for a new trial on the ground of newly discovered evidence, it is not necessary that the petition be accompanied by a certified statement of the former trial given by the presiding judge, or by a recital of the evidence given at such trial.

The petition should set forth the history of the former trial fully enough to show the applicability and effect of the newly discovered evidence, and a statement of the newly discovered evidence itself, to which must be attached the affidavit of the party that the evidence is newly discovered, and also the affidavits of the new witnesses, as to what they will testify to.

Cumulative evidence is additional evidence of the same kind to the same point.

POLAND, CH. J. This is a petition for a new trial in a cause tried in the county court, in favor of the State against the petitioner, the same being an action for taking certain personal property. The petitioner asks for a new trial on the ground that since the trial, he has discovered material evidence in his favor.

The counsel for the state filed a motion to dismiss the petition upon four grounds :

1. That the petition was not brought within two years from the rendition of the original judgment.

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2. That it was not properly served upon the adverse party.
3. Because not accompanied by the affidavit of the petitioner.

4. Because the petition is not accompanied by a certificate of the judge who presided at the trial, showing the applicability of the newly discovered evidence, nor by the evidence given upon that trial.

In relation to the first of these objections, the facts appear to be, that the petition was brought within less than two years after the close of the term, at which the cause was tried, but more than two years from the commencement of the term.

This raises the question, whether a judgment is to be considered as rendered on the first, or last day of the term.

This we regard as settled in this state by the early cases of *Hoar v. Jail Commissioner*, 2 Vt. 402, and *Day v. Lamb*, 7 Vt. 426. Ever since these decisions, the uniform understanding and practice of the profession, and courts in the state, has been to regard judgments as taking effect from the last day of the term.

The service of the petition was made upon Mr. Redfield, who was the attorney of record of the state, in the original action, and also upon the state's attorney of Washington county.

The statute in relation to new trials provides generally that the citation shall be served upon the adverse party. No provision is made for cases where the adverse party resides out of the state, nor do any of our statutes make provision for the service of any kind of process upon the state. In *Wellington v. Aiken*, decided some years since in Caledonia county, but not reported, it was held that where the adverse party lived out of the state, service of a petition for a new trial was properly made upon his attorney of record, on the ground that his attorney was his selected agent to represent him, and act for him in that matter, and unless service on him was sufficient, the other party would be deprived of his right to petition for a new trial. The principle of that decision might well enough be applied to sustain the service in the present case.

But the service upon the state's attorney, we think the more

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regular and appropriate service. Service can not of course be made upon the state itself, but must be upon some one of its officers who represents the state. It appears to us that no one of the public officers could be more appropriate to receive the notice, than the state's attorney, whose duty it is by law to act for the state in all prosecutions and suits whatever, affecting its interests, in the courts within his official precinct.

As to the objection that the petition is not accompanied by the affidavit of the petitioner; the facts appear to be, that the property was attached by the petitioner as a deputy sheriff, upon writs in favor of several creditors against one Heustis. The suit against the petitioner was defended by the creditors for whom the defendant attached the property, and who were the real parties in interest in the suit. It also appears that the petitioner has gone into the United States service, and was not in the state when the petition was brought. The petition must be brought in his name, because he was the defendant of record, and the judgment recovered was against him. But we regard the rule requiring the petition to be sworn to, or accompanied by the affidavit of the adverse party, as abundantly satisfied by the affidavits of the creditors, who were the real defendants in the original suit, which do accompany the petition.

The remaining objection, that the petition is not accompanied by any certificate of the presiding judge, or the evidence given upon that trial, is made upon the supposed requirement of an early rule of the supreme court, found in 1 Aik. 399. It might be supposed from the reading of the rule, that the minutes of the judge of the former trial, or his certificate to a statement of the trial must be annexed to the petition, and be served upon the adverse party. But such has never been the practical construction of it so far as we know, or can ascertain. In *Cardell v. Lawton*, 16 Vt. 606, it was decided that the minutes of the judge of the evidence, taken at the trial, need not be made a part of the petition, but that it was enough that they were produced at the hearing of the petition.

This case seems a full answer to this objection.

As we understand the practice which has always prevailed

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and been sanctioned, in petitions for new trials, the petition must set forth the history of the former trial, fully enough to show the applicability and effect of the newly discovered evidence, and a statement of the newly discovered evidence itself, to which must be attached the affidavit of the party that the evidence is newly discovered, and also the affidavits of the witnesses from whom the new evidence is expected, of what they will testify. This course is at least impliedly sanctioned by the rule made as to new trials in 1851; see 22 Vt. 670.

The motion to dismiss is therefore overruled.

As to the merits of the application for a new trial, it appears that the property which was sued for, (a quantity of stone-cutter's and blacksmith's tools,) originally belonged to Heustis. Heustis took a contract on the re-building of the state house, of Dr. Powers, the superintendent, and entered upon the work. It was claimed on the part of the state, that some difficulty having arisen, Heustis relinquished his contract, and sold the tools, which had been used on the work, to Dr. Powers, as agent for the state, and that thereafter Heustis, and the men who had before been employed by him upon his job, were employed as laborers by the day, directly for the state. A feeble attempt seems to have been made, in the defence, to deny that such an arrangement was made, by which the tools were to become the property of the state, but the great point upon which the defence went, was that there had been no such visible and apparent change of possession, as to render the sale valid against the creditors of Heustis. The newly discovered evidence is to this effect, that at the session of the legislature in 1858, Heustis presented claims for services, and various other things, against the state, which were referred to the committee on claims; that a hearing was had before the committee, where Dr. Powers appeared on behalf of the state and presented counter claims against Heustis; that just at the close of the session the committee adjusted all these claims between the state and Heustis, upon the footing that the state should not be charged for the tools, but they should be treated as remaining the property of Heustis; that a bill was reported to pay the balance found due Heustis on this basis, which was duly passed, and the amount

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accepted by Heustis. The affidavits filed in the case seem to establish these facts very clearly. If they are true, it is clearly unjust that the state should compel the creditors of Heustis, who took these tools to satisfy their just debts, to pay the state for them.

There was no attempt to prove these facts at the former trial, nor is there any proof they were known to the petitioner, or the creditors for whom he acted, nor are we able to say that they were guilty of negligence in not discovering them. It is objected, however, that the evidence is *cumulative*, and therefore insufficient to entitle the party to a new trial. There seems to be great confusion in the cases in our reports, in the use of this word *cumulative*, as to what it means. In *Parker v. Hardy*, 24 Pick. 246, the court defined this term: "Cumulative evidence is additional evidence of the same kind, to the same point." We have found no definition which appears to us to be so clear, and so accurate. In that case, the action was trover for a horse, and the defendant at the trial, proved that he bought the horse of a third person, and attempted to prove that the plaintiff had given authority to such third person to make the sale. The newly discovered evidence consisted of admissions of the plaintiff that he had given such authority, and the court held it not objectionable, on the score of being cumulative, there being no evidence of admissions used on the first trial.

With this view of what is *cumulative evidence*, it is clear the objection is not available here.

New trial granted.

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JOSEPH RIKER v. SAMUEL R. HOOPER.

*Pounds. Impounder. Pound-keeper. Judgment. Evidence.
Penal Actions. Limitation. Pleading.*

A former judgment in a civil action is not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions.

In an action by an impounder to recover the penalty prescribed by sec. 10, chap. 92, Comp. Stat., (Gen. Stat. chap. 100, sec. 10,) against the owner of the animal impounded, for not redeeming or replevying the beast, full proof must be made by the plaintiff, as in a criminal action. Therefore, where the question of the legality of the notice of the impounding by the impounder to the owner of the beast was in issue in such a penal action, *held*, that a judgment in favor of the impounder in an action of trover against him by the owner of the animal for illegally impounding it, which involved the sufficiency of such notice, was not admissible even as *prima facie* evidence of the legality of the notice.

When there is not a sufficient pound in a town, one may impound in an inclosure of another person, as well as in his own.

If, in a town where there is not a sufficient pound, one impounds an animal in the barn of the public pound-keeper, and does this because he is pound-keeper, and the latter consents to receive and keep the animal as public pound-keeper, the action for the penalty and the expenses of keeping the animal, provided by sec. 10, ch. 92, Comp. Stat., must be brought by the pound-keeper, and not the impounder.

Such forfeiture does not include the expenses of keeping the animal, while impounded. They are separate and distinct matters, but they may be both recovered in one action.

The claim for such forfeiture is not barred in nine months.

CASE founded upon chapter 92, section 10, of the Compiled Statutes, (General Statutes sec. 10, p. 618,) relating to pounds, &c. The declaration contained two counts. In the first the plaintiff alleged that on the 6th of October, 1857, he found the defendant's horse in his enclosure, in Groton, doing damage, and that he impounded him in the barn of Moses Hatch, in Groton, that town at that time being destitute of a legal and sufficient

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pound; that within twenty-four hours after such impounding the plaintiff personally notified the defendant thereof, and of the place where the horse was impounded, but that the defendant had never replevied or redeemed the horse, and that the plaintiff had been compelled to take care of and support the horse, and that thereby an action had accrued to the plaintiff, founded upon the aforesaid section and chapter of the statutes, to recover seventeen cents for each day, viz., four hundred days, the defendant had neglected to replevy or redeem the horse. This count averred a damage to the plaintiff of fifty dollars.

The second count set forth the same facts, and claimed to recover for the food and drink furnished, and the care bestowed upon the horse by the plaintiff, while he remained so impounded. This count averred a damage to the plaintiff of one hundred dollars.

The defendant moved to dismiss the suit, because the county court had not original jurisdiction, the whole amount of forfeiture being less than one hundred dollars.

The county court, POLAND, J., presiding, overruled the motion, holding that under the declaration the plaintiff might recover not only the forfeiture, but also the expense of keeping the horse while impounded. To this decision the defendant excepted.

The defendant pleaded the general issue, and the cause was tried by jury at the December Term, 1859, POLAND, J., presiding.

The plaintiff offered evidence tending to show that he had taken the defendant's horse doing damage in his enclosure, on the 6th of October, 1857, and impounded him in the barn of one Moses Hatch, in Groton, and that the defendant neglected to replevy or redeem the horse until October 11th, 1858. In support of the legality of his proceedings in impounding this horse, the plaintiff offered in evidence the record of a judgment in a suit in trover in favor of the defendant against him, for the recovery of damages for conversion of the same horse, which judgment was for the present plaintiff, and also offered evidence to show that the plaintiff in that action insisted and attempted

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to show that the notice of impounding was illegal in not stating where the horse was impounded, which evidence was admitted.

It was proved that the public pound in Groton was insufficient. It also appeared that Moses Hatch was the pound-keeper, duly elected at the previous March meeting of that town, and the plaintiff testified that he impounded the horse with Hatch for the reason that he was pound-keeper. It appeared that the horse was kept by Hatch until the decease of Hatch in April, 1858, and by his executor, who employed one Heath to keep the horse on the same premises of Moses Hatch, from the time of Hatch's decease till he was replevied in October, 1858. It appeared that the plaintiff had never paid any part of the expense of keeping, and had never agreed to pay anything for costs or keeping.

The defendant's testimony tended to show that at the time when the plaintiff pretended to notify him of the impounding of his horse, the defendant asked what was to pay, and the plaintiff said he must pay him the costs, and ten or fifteen dollars damages, and that the defendant said to the plaintiff he was willing to pay the costs, but not the damages; but that the defendant made no tender or offer to the plaintiff of any money for the costs. It appeared that the plaintiff gave no notice to the defendant to appoint appraisers of damages. The plaintiff told the defendant he could not have his horse unless he paid the damages as well as the costs. This was said at the above interview, on the day after the impounding.

The defendant offered to prove that the plaintiff did not give him notice of the place where the horse was impounded, but only notified him that his horse was "in the pound." The court excluded the evidence, and decided that the former judgment between these parties, in trover, with the proof that the impounding in question was the same act in question in that case, had conclusively settled the legality of the notice as between these parties. To which decision the defendant excepted.

The defendant offered to prove that directly after being notified by the plaintiff that his horse was in the pound, he went to the

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pound for the purpose of redeeming the horse, and searched for him there and elsewhere, but could not find him, which evidence was excluded by the court, to which the defendant excepted.

The defendant insisted that upon the proof, it should be submitted to the jury to find whether the horse was impounded by the plaintiff in the custody of Moses Hatch as pound-keeper, and in his official character, but the court decided otherwise, and held that this fact, if proved, could not affect the plaintiff's right of recovery, to which the plaintiff excepted.

The defendant insisted that the plaintiff being the impounder, could not sustain this action, inasmuch as the action is given by statute to the pound-keeper; also, that after the death of Moses Hatch the plaintiff could not lawfully detain the horse, and by so doing and giving the defendant no notice that the horse was in custody of Hatch's executor, the plaintiff became a trespasser and could not for that reason recover; also, that the plaintiff could not recover at all on this evidence for the expense of keeping, and that in this action the only recovery, if any, must be for the penalty of seventeen cents a day, and that only for such offences as had occurred within nine months of the commencement of the suit, and that no recovery could be had in this suit for costs of keeping; also, that the judgment in the action of trover was not evidence in this case, inasmuch as this was a strictly penal action, which must be sustained by a higher degree of proof. It did not appear that any demand was made upon the defendant for costs of keeping, either by the plaintiff or Moses Hatch, or his executor, before the commencement of this suit; the defendant also insisted that the penalty was in full for all costs of keeping the horse.

The court directed the jury to return a verdict for the plaintiff for the penalty of seventeen cents a day for each day, after forty-eight hours from the time of being notified of the impounding, to the date of service of the writ of replevin, which was the 11th of October, 1858, and a reasonable sum for costs of keeping, together with impounding fees and charges, to which instruction the defendant excepted. Verdict for the plaintiff for one hundred and three dollars.

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Peck & Colby, for the defendant.

O. O. Dewey and *A. Underwood*, for the plaintiff.

ALDIS, J. This is a suit to recover a forfeiture, and therefore the rule of evidence in criminal cases applies, that all the facts material to sustain the suit must be proved beyond a reasonable doubt. One material fact is that the plaintiff gave notice to the defendant of the place where the defendant's horse was impounded, Comp. Stat. chap. 92 sec. 8. Without such notice the impounding and the detention of the horse were illegal, and the forfeiture and expense of keeping can not be recovered. To prove this notice, the plaintiff showed that the defendant had sued him in trover for the detention of the horse in the pound; that on the trial of that case the present defendant contended that the impounding was illegal upon the ground that the notice did not state where the horse was impounded; that the judgment was for the present plaintiff—and the plaintiff offered the record of that judgment, in connection with proof of the above facts, to show that his proceedings in impounding the horse, and in giving the notice where he was impounded, were legal. To this the defendant objected, but the evidence was admitted. The defendant then offered to show that the plaintiff did not give him any notice of where the horse was impounded. This was objected to by the plaintiff, on the ground that the judgment in trover had conclusively settled the question of the legality of the notice, and that the parole evidence on the part of the defendant was not admissible to show that the notice was not legal. The court held the record conclusive, and excluded the parole evidence.

The objection to this ruling is not that the very point was not there litigated between the same parties, but that, that action being a civil suit, the jury might have found the fact upon the mere preponderance of evidence, and that they might not have so found if they had been required to have been satisfied of it beyond a reasonable doubt, and therefore that their verdict, resting upon such inferior amount of evidence, ought not to be held conclusive or admissible in this penal action.

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We think the objection stands on solid grounds. All who are conversant with courts must have observed that juries will render verdicts in civil cases upon light evidence—the mere balance of probabilities—when in criminal cases nothing would induce them to so decide. The law justifies them in so doing. The distinction is an important one, and leads to widely different results. To admit the judgment in trover as conclusive here, might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to his case. But we do not think it admissible even as *prima facie* evidence of the legality of the notice. For to hold this would be to require the defendant to establish by proof on his own side that the notice was not legal, before the fact had been established on the other side by the requisite legal proof, viz: proof beyond a reasonable doubt; see 1 Greenleaf on Ev. section 537, and cases cited.

II. The statute provides that if there is no pound in a town, any person in such town may impound “in his own barn or in some other enclosure,” notifying the owner where his beast is impounded. The defendant contends that the impounder must impound “in his own barn or in some other enclosure” of his own, and that the impounding in Moses Hatch’s barn was illegal.

This is untenable. The language of the act does not require, but rather excludes the construction. The person wishing to impound might have no other enclosure of his own than the field in which the beast was taken *damage feasant*.

III. Moses Hatch was pound-keeper, and the plaintiff testified he impounded the horse with him because he was pound-keeper; that Hatch had kept the horse, and that the plaintiff had never paid or agreed to pay anything for keeping. He here sues for the expense of keeping, and for the forfeiture incurred by the owner for not replevying or redeeming.

The defendant insisted that he had the right to go to the jury upon the question whether the plaintiff impounded the horse with Hatch as pound-keeper, and in his official character; and claimed that the plaintiff could not sustain the action, which

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was given by statute to "the pound-keeper." The court held that though the plaintiff did impound with Hatch "as pound-keeper," still the plaintiff could recover, and directed a verdict for the plaintiff. This must have been upon the basis, that where there is no public pound, the pound-keeper of the private pound is not strictly pound-keeper, but merely agent of the impounder, and he the pound-keeper. •

If the impounder had acted himself as pound-keeper, by impounding the beast in his own barn, or if he had procured some other enclosure, and had employed some other person as his servant or agent to keep and feed the beast for him, then he would have been pound-keeper *pro hac vice*, and entitled to recover the expense of the keeping which he had thus incurred or become liable for, and the forfeiture which the law gives as compensation to him who is obliged to keep the animal an unreasonable time. But it appears in this case, that the plaintiff impounded the horse with Hatch (the public pound-keeper elected by the town) because he was pound-keeper, and in his official capacity, and that the plaintiff had never agreed to pay, and never had paid anything for costs or keeping. Without saying that Hatch was bound to receive the horse as pound-keeper, when there was no public pound, yet if he waived that question and did consent to receive and keep him as pound-keeper, we think he must stand upon his rights, and be bound by his duties as pound-keeper, the same as if he had impounded the beast in a public pound. He would not be the servant or agent of the impounder. The impounder would have no greater rights than if he had impounded in the public pound. The owner of the beast would be justified in dealing with the pound-keeper as acting in his official capacity.

Our statutes have altered the common law as to pounds and impounding, in several important particulars.

At common law, animals impounded in the *common* pound were to be fed by their owners, and hence the common pound was always a pound *overt*, having a back wall and yard where the owner might go and feed them without offence. So its oversight was committed to the steward of the leet, "who," it was

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said, "should be a barrister of learning and ability." No notice need be given to the owner of the impounding of his beasts in the common pound.

But, by our statute, the pound-keeper elected by the town at March meeting has charge of the pound, is bound to receive animals and keep them, and supply them with food and drink, and the owner is entitled to notice of the impounding.

At common law, if the impounding was not in the common pound, but in a special pound *overt*, the owner was entitled to notice, and then he was to supply food. If the impounding was in a special pound *covert*, (such as a barn or other enclosure, where the owner could not have access to his animals to feed them without offence,) then the impounder was to give notice and feed them at his peril. Our statutes have thrown the duty of supplying the animals with food upon the pound-keeper, and makes him liable to the owner for all damages arising from his neglect of his duty.

As the pound-keeper is thus made by law the passive custodian of the beasts impounded, and must supply their food,—as he can not let them go on one hand, nor redeem or replevy them on the other,—it is obvious, that through neglect of the owner to either redeem or replevy, the animals might be left a long and unreasonable time in the pound, the keeper put to great expense, and the pound in time be overrun by the number of animals impounded.

Hence prompt and summary action is the rule of the impounding law.

The impounder must give notice to the owner within twenty-four hours. The owner must redeem or replevy his animals within forty-eight hours after notice, or forfeit seventeen cents per day for each beast he suffers to remain in pound, "and pay all legal charges to the pound-keeper, which forfeiture" (in the words of the statute) "*shall be recovered by the pound-keeper for his own use, in an action on the case.*"

These provisions of the statute are plainly intended to oblige the owner to act promptly on the question, whether he will con-

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test the lawfulness of impounding by replevying the property, or will yield to it and redeem. Delay on this point might embarrass the pound-keeper, by leaving upon his hands many animals which he ought not to be obliged to keep, and whose increasing numbers might become a burden and nuisance to him. It might involve him, (and the impounder, if liable in the first instance,) in great and needless expense. It is reasonable that the owner, who by replevin can protect all his legal rights, should take and keep his own animals. If he replevy he is not bound to pay the costs and legal charges of impounding, in order to get back his property, but they are taxable against him in the replevin suit, if the impounder recover. See Chap. on Replevin, Comp. Stat. p. 268 sec. 7. If he redeem, he thereby admits the impounding lawful, and must pay the costs, charges and damages; chap. 92 sec. 3. Such being the rights of the owner, if he neglect to replevy or redeem, he is in the wrong. His neglect increases costs and expenses,—delays the settlement of the wrong complained of, whereas it should be settled while the damage and injury are recent and easily shown, and incumbers the pound with animals that ought to be in their owner's keeping. Thus, if he delays for more than forty-eight hours after notice, he becomes liable to the pound-keeper for the forfeiture and legal charges, and the pound-keeper may sue him therefor at any time. "The legal charges" include the expense of keeping, and he is thus made directly liable therefor to the pound-keeper. The statute in providing that the pound-keeper may recover therefor in his own name, intends that he shall bring the action who is entitled to the forfeiture, and thus excludes the impounder, unless he becomes pound-keeper.

In this case, as the evidence tended to show that the impounder did not intend to be the pound-keeper, but on the contrary applied to the pound-keeper, as such, to take and keep the horse, we should be required in order to make him pound-keeper to hold, that in all cases where there is no public pound in a town, the impounder must of necessity be regarded as pound-keeper, and can not by applying to the official pound-keeper relieve himself from the duties of the office. We do not think that this would be con-

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sistent with the spirit or policy of our statutes. The exclusion of the evidence we deem erroneous.

The defendant also contended that the forfeiture was in full for the costs of keeping.

The language of the statute that "he shall forfeit seventeen cents, &c., and pay all legal charges," &c., fairly implies that the legal charges shall be in addition to the forfeiture. The old statute of March 2nd, 1787, from which this is taken, is explicit: "he shall forfeit seventeen cents," &c., "*besides* paying all necessary charges to the pound-keeper, for giving meat and drink to such creatures."

The defendant also claims that in this suit nothing can be recovered but the forfeiture. The right to sue for the expense of keeping arises from the liability of the pound-keeper, as created by statute, hence when the facts requisite by statute to raise the liability exist, the pound-keeper may sue. So, too, of the forfeiture—it is created by statute. These rights of action need not be coupled together. Still, where both exist, and the facts which give rise to them are all set forth in the declaration, and both are there claimed as substantive grounds of recovery, (as in this case,) we see no objection to having damages for both included in the verdict. The defendant can not complain if the plaintiff sees fit to include his claim under the statute for the expense of keeping in his penal suit to recover for the forfeiture, and so subject himself to the stricter rule of full proof to sustain his declaration.

The defendant further claimed that all claim for forfeitures prior to nine months before suit brought, were barred by the limitation in section 23 of the statute: "every prosecution for a fine, under the provisions of this chapter, shall be commenced within nine months after the offence is committed, and not after."

But this provision, we think, applies only to fines proper, named in the chapter,—such as fines for rescue, pound-breach, named in the two sections next preceding the 23rd section, and others named in the chapter. Such fines go into the public treasury. The forfeitures named in the act go to the

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party aggrieved, and not to the town. The forfeitures under the 10th section might extend over more than nine months of time, (as they do in this case,) and be continuous in their character, and in substance but one forfeiture. Upon this construction a suit every nine months would be necessary to give the pound-keeper redress.

The offences for which fines *eo nomine* are given, are not continuous, but complete when once committed, and should, if sued for, be promptly prosecuted.

Judgment affirmed, and case remanded.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,

FOR THE
COUNTY OF CHITTENDEN,

AT THE
JANUARY TERM, 1863.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } **ASSISTANT JUDGES.**

Farmers' and Mechanics' Bank v. Drury et al.

THE FARMERS' & MECHANICS' BANK v. JACOB K. DRURY, AND TRUSTEE, DANIEL H. MACOMBER, AND CLAIMANT, THE MISSISQUOI BANK.

Trustee Process. Promissory Notes. Banks. Discount. Notice.

The principal debtor, at the time the trustee executed certain promissory notes to him, informed the trustee that he might wish to pass the notes to some banks, as collateral security, and in that connection mentioned the claimant and two other banks, and the trustee consented that the notes might be so used. Afterwards the defendant passed the notes to the claimant as collateral security for certain discounts which he obtained from the claimant on the faith of such security, and before the service of the trustee process he informed the trustee, though not by direction or in behalf of the claimant, that the notes were in the latter's hands. *Held*, that such notice to the trustee was not sufficient to protect the notes from attachment by the trustee process in favor of the creditors of the principal debtor.

Held, also, that the notes were not discounted by the claimant, within the meaning of the act of 1852, (Acts of 1852, No. 4, p. 4,) so as to render unnecessary a notice to the trustee by the claimant of the transfer of the notes, in order to protect them from attachment by the trustee process.*

TRUSTEE PROCESS. The commissioner found the following facts:

On the 28th of March, 1861, the trustee for a sufficient consideration executed and delivered to the defendant two promissory notes of that date, one for seventeen hundred dollars, payable on or before March 1st, 1862, and the other for eight hundred dollars, payable on or before September 1st, 1862, both payable to the principal debtor or bearer, which notes had not been paid.

Some days prior to the execution of these notes, Drury, the defendant, called upon the cashier of the Missisquoi Bank, and, stating that he expected to have some promissory notes against the trustee, on or about the 1st of April following, proposed to make an arrangement with the bank for discounts, and to send the notes, which he so expected to have against the trustee, to the bank, as collateral security for his liabilities to the bank

* NOTE.—*Aliter* now by statute; see General Statutes, chap. 34, sec. 47.—
REPORTER

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growing out of such discounts ; which proposition was accepted, and on the same day the bank, relying upon the promised security, discounted for him his draft on Boston for one thousand dollars.

Pursuant to this arrangement, on the 12th April, 1861, Drury sent to the claimant, the Missisquoi Bank, the two notes above described, having endorsed them in blank, and they remained in the possession of the claimant up to and at the time of the hearing before the commissioner.

Between the 12th April and 26th May, 1861, the Missisquoi Bank, relying upon the responsibility of Drury and the security afforded by the two notes above mentioned, also discounted two other drafts for Drury for one thousand dollars each, drawn by him on Boston ; which drafts, as well as the one before mentioned, were still held by said bank, and had not been paid.

At the time of the execution of said two notes, or soon afterwards, the trustee was informed by Drury that he might wish to pass them to some banks as collateral security, and in that connection mentioned two banks in Burlington and the Missisquoi Bank, and the trustee consented that the notes might be so used.

On the 26th, and also on the 27th May, 1861, the trustee was informed by Drury that the notes in question were at the Missisquoi Bank ; and on the 31st of the same month, Homer E. Hubbell, the attorney and a director of said bank, called on the trustee with the notes, and informed him that they were held and owned by that bank. The writ in this case was served on the trustee May 28th, 1861.

Upon these facts the county court, at the April Term, 1862, PIERPOINT, J., presiding, *pro forma* adjudged the trustee not chargeable, and decided that the claimant was entitled to the fund in the trustee's hands, to which the plaintiff excepted.

S. Wires and *Wm. G. Shaw*, for the plaintiff.

Peck & Colby, for the claimant.

POLAND, CH. J. The report of the commissioner shows that no notice of the transfer of the trustee's notes to the claimant,

by the principal debtor, had been given to the trustee, prior to the service of the trustee process, except by the principal debtor himself, and it does not appear that such notice was given at the request or on behalf of the claimant. Such notice was therefore insufficient to protect the notes in the hands of the claimant against a trustee attachment, as has heretofore been held; *Peck v. Walton and Trustee*, 25 Vt. 33; *Webster v. Moranville and Trustee*, 30 Vt. 701.

The claimant, however, insists that the notes were held in such manner, that no notice of transfer was necessary to the trustee to protect the notes against a trustee attachment :

Firstly, by reason of what passed between the trustee and principal debtor, at the time of the execution of the notes, or soon afterward, that the principal debtor said he might wish to pass the notes to some bank as collateral security, and mentioned the claimant among other banks, and the trustee consented he might so use them. This claim is made upon the ground that the case falls within the decision in *Downer v. Marsh and Trustee* 28 Vt. 558.

But an examination of that case readily shows, that there is no analogy between the cases. In that case the claimant was present when the note was given, and it was executed for the very purpose of being delivered to the claimant, to pay a debt the principal debtor owed him, and the business was all completed in the presence of the trustee, except that the precise amount due to the claimant from the principal debtor had not been ascertained.

The court held that no further notice of transfer was necessary. We think it might well have been put upon the ground that there was no transfer, but that the note was executed directly to the claimant.

But here the facts are wholly different; it was uncertain whether the principal debtor would transfer the notes at all, or if he did conclude to do so, to what bank, and from what was then said between him and the trustee, the trustee had no more ground to expect the notes would go into the claimant's hands, than those of two other banks, and either of those banks would have had equal grounds to set up title to the notes, that the claimant

has under this arrangement, if the notes had been transferred to them.

Secondly, the claimant insists that no notice of the transfer of the notes was necessary, because these notes had been transferred to, and discounted by the claimant, and so were protected against a trustee attachment, by the act of 1852.

These notes had been transferred to the claimant, in such manner, and upon such consideration, that if sufficient notice of the transfer had been given, before the service of the trustee process, the title of the claimant would have been protected against it. If, therefore, the true meaning of the act of 1852 was to excuse banks from the necessity of giving notice in all cases, where they were holders of negotiable paper by such title as would be available to all persons with notice, then the claimant's title to these notes should be protected. But a careful reading of the statute satisfies us, that the statute was not intended to have so broad a scope. To excuse notice, the paper must not only be negotiated and transferred to a bank, but it must be *discounted by the bank*.

If paper is transferred to a bank as collateral security for a debt already existing, such transfer would be good against a trustee attachment, if the proper notice were given, but no one would claim that such paper is discounted by the bank.

The claimant insists that the facts reported show that these notes had been *discounted at the bank*.

The bank had discounted a draft for one thousand dollars for the principal debtor, before receiving the notes of the trustee, and two drafts of a thousand dollars each afterwards, and held the trustee's notes as collateral security for the payment of these drafts. But when the first draft was discounted the bank relied on Drury's promise to furnish the security of the notes, and when the other drafts were discounted they relied upon the security of these notes then in their hands. The claimant's counsel insists, that this was a discount of these notes, within the fair intent and meaning of that term in the statute; that if they relied upon the credit and security of these notes when they advanced money to Drury on his drafts, that is a discount of the notes.

It is not claimed that the bank had become the purchaser of

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these notes, or advanced their money for them. They purchased or discounted Drury's drafts, and those drafts represented their debt against him. The drafts were for different sums, and were payable at different times from the notes. They held the notes as collateral security merely for the payment of the drafts, and if the drafts were paid either by Drury or the drawee and acceptor, the notes were the property of Drury.

The statute, we think, was carefully drawn so as to extend only to cases where banks have advanced their money for, and become the purchasers and owners of, the securities, and that it can not be extended to cover, and excuse notice in, cases where they take paper merely as collateral security for paper which they have discounted.

Our statute requiring notice of transfer of negotiable paper, in order to protect it against trustee process, was a great clog upon the negotiability of paper, but in this state its operation bore more severely upon banks, and those dealing with them, than others, because their dealings in such securities were more extensive than those of all others in the state, and hence the statute of 1852 relieving banks from the necessity of giving notice.

But it was only intended to relieve the banks whilst pursuing the ordinary and legitimate business of discounting or purchasing negotiable paper, and advancing their money for it, and when they take it merely as collateral security, or in any other mode than ordinary discount, to leave them subject to the same burden as private persons, or other corporations.

The result is that the judgment of the county court, that the trustee is not chargeable, and that the claimant is entitled to the fund, is reversed, and judgment is rendered that the trustee is chargeable, and that the plaintiff recover costs against the claimant.

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JACOB K. DRURY v. MILO DOUGLAS.

Book Account.

The plaintiff delivered money to the defendant to be carried by the latter, as a mere messenger, to a third person. The defendant agreed so to deliver the money, but neglected to do so. *Held*, that the plaintiff could not maintain book account for the amount of money so delivered.

BOOK ACCOUNT. The auditor reported that the plaintiff claimed to recover one hundred dollars, and interest, which the auditor found he delivered to the defendant, in cash, to carry and deliver to one Sibley, and which the defendant received for that purpose and agreed to deliver to Sibley, but which he neglected to do. The auditor also found that at the time of the delivery of the money in question by the plaintiff to the defendant, it was not expected by either party that the same was to become a matter of account between them, and that the defendant had no right or authority, expressed or implied, to make any use whatever of the money, except to carry and deliver it to Sibley, unless such right or authority was to be implied from the delivery of the money for the purpose above stated.

Upon this report, the county court, at the April Term, 1861, PIERPOINT, J., presiding, rendered judgment for the plaintiff, to which the defendant excepted.

J. French and E. R. Hard, for the defendant.

Wm. G. Shaw and Geo. F. Edmunds, for the plaintiff.

ALDIS, J. The money was delivered to the defendant to carry to another—for that purpose only. There were no dealings between the parties with which it was connected. The defendant had no interest in it—no right to use it. He was a mere messenger to carry it to Sibley.

His neglect or refusal to carry it to Sibley was a tort. Can a tort, pure and simple, be charged on book? To hold that would

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be going quite beyond any precedents, (and they have already gone quite as far in this direction as it is wise and safe to go,) and would break down the distinction between forms of actions, between torts and contracts,—a distinction existing in the nature of things, as well as in the artificial rules of pleading.

Whiting v. Corwin, in the 5th Vt., is relied on by the plaintiff as being directly in point. The view of that case which the plaintiff here urges was there presented to the court. But CH. J. HUTCHINSON in his opinion denied that that view of the facts was correct; and held that the money was there delivered to be used by the defendant for the benefit of the plaintiff, and to be accounted for.

Our courts have been disposed to extend the action of book to all matters of account, whenever they could properly do so, on account of the advantages which that mode of trial presents over a trial by jury in the investigation of items of account. That reason remains in full force.

It was also often resorted to for a reason that has ceased to exist—the admission of the parties in that form of action to testify. As by our recent statutes parties may testify in all civil suits, that distinction in favor of book account no longer exists.

Judgment reversed, and judgment for the defendant.

Hickok v. Farmers' and Mechanics' Bank.

**JAMES W. HICKOK v. THE FARMERS' AND MECHANICS'
BANK, AND MORTON COLE.**

[IN CHANCERY.]

*Principal and Surety. Promissory Note. Equitable Estoppel.
Chancery. Evidence.*

The request by a surety on a debt to the creditor to commence suit thereon, and secure the debt upon the principal's property, does not impose the obligation upon the creditor to comply with the request, or to make good to the surety the amount that might have been secured by such an attachment.

Neither do the facts that the surety resides out of the state, and is embarrassed and unable to pay the debt, that the bankruptcy of the principal is imminent, and that his personal property is known and easily attachable, that it can be attached without expense to the creditor, and that the surety's counsel is ready to see that the attachment is faithfully made, alter the rule of law in this respect, nor afford the surety any ground of relief against the creditor for not complying with his request to sue the principal, or to attach his property upon a suit already commenced, the service of the writ in which is not completed.

An assurance given by the payee of a promissory note to a surety thereon, at the time of its delivery, without which assurance the surety would not have signed the note, that if not paid at maturity the payee would immediately proceed to collect it out of the principal, accompanied by the fact that the payee suffered the note to remain unpaid for more than a year after its maturity without taking any steps to collect it, or notifying the surety of its non-payment, until after the failure of the principal, notwithstanding it might during that time have been collected of the principal, and the further fact that the principal relied on this assurance, and in consequence thereof omitted to take measures to secure himself, constitutes an equitable estoppel against the enforcement of the note against the surety, and relief will be granted him in that respect by a court of equity.

Held, that the proof in this case did not establish the fact that any such assurance was given.

In the examination of witnesses in chancery, the practice of having the questions shown to the witness, and his answers prepared beforehand, and reduced to writing and examined by counsel before coming before the master to testify, severely reprehended.

BILL IN CHANCERY. The bill was dated and sworn to by the orator on the 22nd of September, 1858, and was filed October 4th, 1858, and set forth in substance, that on the 23rd of June,

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1856, Morton Cole, of Burlington, requested the orator, then a resident of New York city, but at that time transiently in Burlington, to sign with him, as his surety, a promissory note for \$1500, of that date, and payable at the Farmers and Mechanics' Bank, of Burlington, four months after date, which note was to be used to renew one of a like amount, held by that bank against Cole and the orator, as his surety; that Cole assured the orator that if he would sign such note as his surety, he, Cole, would promptly pay it at maturity; that before delivering the note to the bank the orator informed the cashier that Cole had agreed to pay the note when it matured, that the debt had been long due to the bank, and that when this note fell due the orator wished to have it collected out of Cole, in case Cole did not pay it; that to this course the cashier assented, and that the orator then delivered the note to the cashier for the use of Cole, with the distinct understanding between the orator and the cashier that the note should be collected out of Cole when it fell due, in case Cole failed to pay it at maturity; that at that time, and for nearly two years thereafter, Cole resided in Burlington, being largely engaged in business, and the owner of sufficient attachable personal property to secure a debt larger than the note above mentioned, and that the reason the orator was anxious to have the note collected, was because the orator was then residing in New York and so situated that he could not look after Cole's pecuniary condition, and that these facts were well known to the Farmers and Mechanics' Bank; that when said note fell due on the 23rd October, 1856, it was not paid by Cole; that the bank did not notify the orator of its non-payment, and wholly neglected to proceed to collect it of Cole, as they had agreed to do; that the orator continued to reside in New York from the date of the note until April 14th, 1858, when he removed to Burlington; that the orator heard nothing in relation to said note from any source after delivering it to the bank, as above mentioned, until in March, 1858, but supposed during all that time that it had been paid by Cole; that in March, 1858, he was informed in New York, by Salmom Wires, Esq., the attorney and one of the directors of the bank, that the note had not been paid, and that a suit had been commenced upon it against the orator and Cole,

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in favor of the bank, returnable to the March Term of the Chittenden County Court, then approaching, and that an attachment of the orator's real estate had been made thereon, but the service of the writ had not been completed upon Cole ; that at the time the orator received this notice from Wires, Cole resided in Burlington, and that he then, and for several days thereafter, had in his possession and ownership attachable personal property amply sufficient to secure the said note by attachment ; that immediately upon receiving this information from Wires the orator informed Wires, as agent for the bank, and also informed the bank, that he claimed the bank had violated the agreement above set forth in relation to the collection of the note out of Cole at its maturity, and he requested the bank, and Wires, as its attorney, to cause Cole's personal property to be attached in the suit in favor of the bank against the orator and Cole on the note, so that the note might be collected out of the principal, and not out of the surety ; and that at the same time he informed the bank of the fact, which they well knew, that he had no security for having signed said note as Cole's surety ; that the bank wholly neglected and refused to attach Cole's property in said suit, or to take any measures whatever to secure said note against Cole ; that some eight or ten days after the orator so requested the bank to make such an attachment of Cole's property, Cole became wholly insolvent, and all his property was attached by his other creditors, and that no debt could, at the time of bringing the bill, be secured against him ; that the suit in favor of the bank against Cole and the orator, upon said note, was duly entered in court, and was pending at the date of the bill ; that after the maturity of said note, in April, 1857, the bank agreed with Cole to extend the time of payment thereon a reasonable time, to suit Cole's convenience, provided and in consideration that Cole would take up certain other notes, then held by the bank against Cole, upon which one Matthew Cole, an irresponsible person, was surety, and would give new notes for the same with some good endorser in place of Matthew Cole, and that, in pursuance of such agreement, Cole did, in April, 1857, take up the Matthew Cole notes, and substituted for them notes signed by himself and by a responsible endorser, and that the bank, in

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pursuance of such agreement, did extend the time of payment upon the note signed by Cole and the orator until March, 1858, when the above mentioned suit against Cole and the orator was commenced.

The bill alleged the necessity of a discovery of the facts relating to the above matters, from Cole and the officers of the bank.

The prayer of the bill was that the Farmers' and Mechanics' Bank might be forever enjoined against the further prosecution of their suit at law upon said note against the orator.

Upon the filing of the bill, verified by the oath of the orator as to the truth of the statements therein contained, a temporary injunction in accordance with the prayer of the bill was granted.

The bill was taken as confessed against the defendant Cole for want of an answer.

The answer of the Farmers' and Mechanics' Bank was sworn to by C. F. Warner, the cashier, for the bank, and was filed February 21st, 1859. In this answer the bank denied the allegations of the bill in relation to the agreement between the cashier of the bank and the orator in regard to the collection of the note at maturity, and stated that the note in question was received by the bank in the ordinary course of business, and without any restrictions or agreements, except such as the note contained upon its face. The answer also denied any agreement for the extension of the note in question.

In regard to the interview between the orator and Wires in New York in March, 1858, the answer stated that the orator then requested Wires to cause Cole's personal property to be attached upon the suit at law upon said note; that Wires informed the orator that the directors were unwilling to institute the requisite search for Cole's small amount of personal property, and that they insisted the orator should take up the note himself; and that the orator then said he would write to the bank and urge the bank officers to cause such attachment to be made, which he did not do; that the orator did not in March, 1858, or at any other time previous to the bringing of the bill, inform Wires or the bank of any violation of any agreement

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on the part of the bank in regard to the collection of the note out of Cole at maturity, or that any agreement whatever in regard to the collection of the note had been made.

The answer denied the statements of the bill in regard to the value of the personal property owned by Cole in March, 1858, and stated that all the property owned by him at that time was of very trifling value, and not half sufficient to secure said note by attachment. In other respects the answer substantially admitted the allegations of the bill.

This answer was traversed and testimony was taken on both sides, the purport of which sufficiently appears in the opinion of the court.

During the examination of the orator before the master, the solicitor for the Farmers' and Mechanics' Bank objected to the manner of examining the witness, on the ground that the interrogatories were prepared, and the answers written beforehand, and read by the witness in answer to the interrogatories when propounded before the master. Upon this point the orator then testified, that the interrogatories were prepared and presented to him by his solicitor before the examination, and that the orator wrote his answers thereto without consulting with his solicitor, but that since writing them, he had read to his solicitor those answers relating to the alleged agreement between the orator and the cashier of the bank at the inception of the note, and also those relating to the interview between the orator and Wires in New York in March, 1858, but that no part of such answers was suggested by his solicitor. The testimony was taken subject to this objection.

On the 4th of December, 1860, after the testimony had been taken and the cause set down for hearing before the chancellor, the orator asked leave to amend his bill, which was granted, and he then filed certain amendments, alleging that on the 5th of March, 1858, in New York, the Farmers' and Mechanics' Bank, through Wires, its director and attorney, agreed with the orator that as soon as Wires returned to Burlington, the bank should cause Cole's personal property to be attached on the writ in favor of the bank against the orator and Cole, and that the orator relied on such promise, and therefore took no farther

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steps to secure himself, which he would have taken if it had not been for such promise and his reliance thereon.

Another amendment to the bill was that after this agreement made in New York and Wires' return to Burlington, there was ample time for the bank to have attached Cole's personal property, and to have secured said note thereby.

The bank filed an answer to this amended bill, which was sworn to by S. Wires, for the bank, entirely denying any agreement by the bank, or Wires, to cause Cole's personal property to be attached on the writ upon said note, and asserting that Wires gave no assurance to the orator that he would do anything in connection with the attachment of Cole's property, except in the event of the orator's writing to the bank officers, requesting such attachment, as he promised to do, as stated in the original answer, and the consent of such officers to comply with such request.

Testimony was taken in support of the answer of the bank to the orator's amended bill, and the cause was heard before **PINK-POINT**, chancellor, at the April Term, 1862.

The chancellor dismissed the bill with costs to the **Farmers' and Mechanics' Bank**, from which decree the orator appealed.

E. R. Hard and Daniel Roberts, for the orator.

Wm. G. Shaw and Asahel Peck, for the defendant, the **Farmers' and Mechanics' Bank**.

ALDIS J. The orator, as surety for Morton Cole, signed a note to the **Farmers' and Mechanics' Bank** for the sum of \$1500. By this bill he seeks relief from his liability upon the note, and his claim to relief rests upon four grounds, which are thus stated in the brief of his counsel:

"1st. Upon the understanding, had at the time the note in question was executed, that it should be collected when it should fall due—the failure, not only to collect it, but to notify the orator an unsecured surety, that the note was unpaid, and allowing it to run nearly eighteen months, the orator reasonably believing it to have been paid, until Cole, the principal, had become insol-

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vent, and the orator had lost the opportunity of securing himself against loss.

2nd. Upon an agreement between the bank and Cole to extend the time of payment of the note.

3rd. Upon the neglect and refusal of the bank, upon the orator's request under the circumstances stated, to attach Cole's personal property.

4th. Upon the agreement of the bank, through its attorney, Wires, to attach Cole's personal property, and its neglect to do so, relying upon which agreement the orator has suffered loss."

We will consider.

1st. The alleged agreement with Wires in New York. The proof of this rests upon the testimony of the orator. He says that on the 4th and 5th of March he requested Mr. Wires to attach all Cole's personal property upon the writ already issued against him and Cole. Wires objected to doing so, because he did not want to quarrel with Cole. The orator still urged the request. Wires then proposed he should write to Warner, and if Warner would direct it he would do it. The orator said he would think of it, and let him know the next day. The next day he said to Wires he would not write to Warner, as he had not been well treated by him in this business; that Warner had given Cole a year and a half's time on the note, contrary to their understanding. The orator insisted Wires should attach Cole's property—made an earnest appeal to him to do so, as an act of simple justice. Finally, Wires reluctantly consented, and said he would attach Cole's property, if any could be found when he got home.

Mr. Wires testifies in direct contradiction of the material points of Mr. Hickok's statement. He says that in reply to Mr. Hickok's request he said that he personally had no objections to doing so, but that the board of directors insisted that he should take up the note and secure himself; that they were opposed to making search for the odds and ends of Cole's personal property, but if he would write to Warner requesting it, he thought it would be done; that he understood Mr. Hickok to agree that he would write to Warner, and he (Wires) on his part agreed to make inquiry as to Cole's property, and be ready, on the receipt

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of the letter and the consent of the bank, to attach ; that Mr. Hickok did not express any unwillingness to write to Warner, or make any claim or complaint that Warner had agreed to collect the note when due, and had not done so.

Thus between these gentlemen there is this plain and direct contradiction upon all the material points in their testimony. Each testifies positively, and to facts inconsistent with the statements of the other. The contradiction can not be reconciled by saying that one asserts what the other forgets. The letter of Mr. Hickok to Chittenden corroborates his testimony, and shows that he understood the matter at the time as he now testifies ; while the declarations of Mr. Wires to Mr. Chittenden, and his letter to Mr. Hickok corroborate his account. The omission to set up these facts in the original bill is entitled to much consideration, and does not seem to be fully accounted for.

The surrounding circumstances and the various suggestions made on behalf of the one and of the other, we have carefully considered. They do not seem to be at all satisfactory or conclusive, and we are compelled to the conclusion, that at the outset there was a misunderstanding between these parties as to this matter.

As the burden of proof rests with the orator, we must come to the conclusion that he fails to establish the facts stated in the bill by the requisite preponderance of proof.

2nd. The request to the bank to sue Cole and attach his property is proved. It is not claimed that such request of the surety obliges the creditor to comply with it, and to make good to the surety the amount that might then have been secured by attachment. It has long been settled in our courts to the contrary. But it is claimed that in this case there are circumstances which give a peculiar force to this request, and entitle the orator to relief : that the orator resided out of the state—that the bankruptcy of Cole was imminent, and his personal property was known, and easily attachable—that it would have made no expense to the bank—that the orator's counsel was ready to see that it was faithfully done—and that the orator was then embarrassed, so that he could not pay the note, were circumstances that commended Mr. Hickok's request to the most favorable and

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courteous consideration of the bank ; but we do not think that they furnish any sufficient ground for making this case an exception to the general rule, or justify us in establishing a precedent that would tend to break down a plain boundary line of the law. The rule as now settled is a plain and practical one, and well understood by business men. If we begin to make exceptions to it in cases that seem to involve peculiar hardship, it will soon become unsettled and uncertain.

3rd. It is also claimed that the bank agreed with Cole to extend the time of payment.

Upon this point the orator relies on the testimony of Mr. Cole and the circumstances which it is claimed corroborate his testimony : the defendant on the testimony of Warner, Wires, and Wales.

Without recapitulating the evidence on this point, we deem it sufficient to say, that the testimony of Mr. Cole and the circumstances relied on are quite insufficient to outweigh the counter evidence of the defendant, and the improbability that the bank would agree to an act which the directors and the cashier must well have known would discharge the surety.

4th. This brings us to the more important and difficult point in the case,—the alleged agreement or assurance of the cashier at the time of the execution of the note, that he would attend to the collection of the note when it fell due—the reliance of the orator upon this assurance—the failure of the bank to do as agreed, and the consequent loss to the orator of all security against Cole.

If this alleged agreement or representation of the cashier were to be treated as a part of the *contract*, and to vary its terms, it is clear that no parole evidence could be admitted to prove it.

Neither is there any evidence to prove that in the making of the agreement, either fraud or falsehood was intended.

But the orator claims to have proved, that at the time of the execution of the note he was known to be merely a surety on it, that he resided in the city of New York, and was therefore unable to keep himself informed of the pecuniary circumstances of Cole, and to protect himself by getting security if Cole should become embarrassed ; that the note had been long due and often

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renewed before, and the orator was unwilling to remain liable as a surety; that Cole promised to pay it punctually when it became due; that the orator told the cashier Warner of all these facts, and that he would not then renew the note unless the cashier would give him the assurance that if the note was not paid at maturity the cashier would attend to the immediate collection of it, and collect it out of Cole's property; that the cashier did give him such assurance; that he relied upon it, and in consequence of his reliance on it did not, when the note fell due, or afterwards, take any measures to secure himself from loss on account of so being surety; that the bank neglected to collect it for a year or more after it matured, during all which time it could have been collected of Cole, and that he had no notice of such neglect until Cole had failed and the orator could obtain no security.

The defendant claims that if all these facts are fully proved they do not amount to a defence. We think, however, that if these facts are proved they should operate as a discharge of the surety, upon the ground that the defendant by its assurances to the orator, has lulled him into a false security—has induced him to omit to do what he would otherwise have done, viz: pay the debt and secure himself by attaching Cole's property, or otherwise obtaining security; and has thus subjected him to the loss of the whole debt. It is properly an equitable estoppel.

Suppose that Hickok had gone to the bank a few days before the note fell due, and said to the cashier: "The note I signed as surety for Cole becomes due on the 24th of October. I am about to go away, and shall not return till next year. Cole is now solvent, but may not long remain so. I wish before I leave to provide means for the payment of the note when due, so that I can proceed against Cole and secure myself, and shall do so unless you will proceed to sue Cole and attach his property as soon as the note is due;" and that the cashier had replied to him, "You need not provide for the payment of the note, for if Cole does not pay it at maturity we will sue him and attach his property, and so secure the debt. You need not trouble yourself further about it;" and that relying on this assurance he had left the state and taken no further trouble about it. Would it not be

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gross injustice for the bank to neglect the collection of the debt till Cole had failed, and deceive the orator by this assurance, and still claim to hold him liable as surety? Clearly so. It is not the request to the bank, or any notice the surety could give, that binds them to proceed against the principal; it is their assurance thus given and thus relied upon that binds them, and which they may not omit to make good except at their own risk. If they *assume* the risk, which the surety will not run, of extending forbearance to the principal when they have promised not to forbear but to sue and attach, and when they know the surety relies upon the promise, and therefore does not secure himself, they must bear the loss that ensues from it, and not seek to charge it upon the surety.

Nor can it make any difference that this assurance is given when the note is executed, instead of just before or after it falls due. It is not the time when the assurance is given that is material, but the deceiving of the surety by it. No intent to deceive may exist when the assurance is given; but the surety is induced by it to forego what he would otherwise have done for his own protection, and thus is in substance deceived.

This principle of obvious justice has been recognized by our own courts, and in the decisions of our sister states. See *Hogboom v. Herrick*, in the 4th Vt. 131, where the principle is recognized as just, though the facts are not found so as to make an application of it to the case. Judge Redfield also, in *Wilson v. Green*, 25 Vt. 450, recognizes it. In Massachusetts, *Harris v. Brooks*, 21 Pick. 195, and *Carpenter v. King*, 9 Met. 511, stand upon the same principle. See, also, 7 Watt's 523; 2 Leading Cases in Eq. 371.

It therefore becomes necessary to consider the evidence to sustain and to disprove this alleged assurance from the bank through Warner to the orator.

As to the following facts there is substantially no controversy: That Hickok was surety for Cole, and this known to the bank; that he resided in New York from August, 1854, to April, 1858, and that his residence in New York was known to the bank in July, 1856, when this note was executed; that Hickok signed as surety for Cole as early as August 6th, 1853; that that original

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note was frequently renewed between that date and July, 1856, and twice during the orator's residence in New York, viz: on the 13th November, 1854, and the 20th December, 1855; that the note here in controversy was given June 24th, 1856, for the renewal of the one given December 20th, 1855, on which the orator was surety for Cole.

Mr. Hickok testifies in substance that at the time of the renewal of this note he was reluctant to renew it; that he inquired of Cole as to his circumstances, and became satisfied that he would be able to pay it when due, and that it would be safe for him (the orator) to sign it, and then told Cole that he would sign it if he would pay it when due, but that before he signed it he must see Warner, the cashier, and have an understanding with him that he should collect the note when due, and that as he was to be out of the state he would not have it lie over due, as it had before; that they went to the bank, and he then told Warner, in the presence of Cole, that he (the orator) should be out of the state for a long time to come, and would not sign the note except with the understanding that it was to be collected when due; and that if he could have the understanding with Warner that it should be collected when due, he would sign the note. Warner replied that the note should be collected when due, or words to that effect. Now the turning point of the evidence and of the case is, what Warner said to Hickok. What Hickok said to Warner could not bind the bank. It is the assurance that Warner gave to Hickok in reply, that we must ascertain, and what Hickok said is of no consequence, except so far as it shows what Warner must have understood and assented to. When Mr. Hickok says that Warner said the note should be collected when due, *or words to that effect*, it is obvious that he states what he understood was the substance of the reply, rather than its language. A slight change of phraseology would most materially modify the meaning, and leave it to signify nothing more than a *desire* on both sides that it might be collected when due.

Again, there is nothing in what Hickok says to Warner, or in Warner's answer, to indicate that it should be collected by suing

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Cole and attaching his property ; but this is the allegation in the bill as sworn to, and is important as directing Warner's attention to the all-important consideration that if not so collected, and Cole should fail, the neglect would operate to Hickok's injury. Indeed, it is obvious that nothing was directly and plainly said by Hickok to Warner to the effect, that Warner should of his own motion, and without further direction, collect the note out of Cole when due, and relieve Hickok from further trouble or attention to it. That may have been, and doubtless was, Mr. Hickok's intent, but he did not directly and expressly say so, and call Warner's attention to that exclusive responsibility on his part.

We can not but doubt, even upon the conversation as stated by Mr. Hickok, whether Warner understood and intended to give the assurance to Hickok that he would, when the note fell due, assume the responsibility without further directions of suing and attaching Cole's property for the benefit of Hickok, or else give notice to Hickok and require the collection of him. It is doubtless true that sureties frequently express the desire to cashiers that the notes they sign should be collected if not paid, and that cashiers in reply express a similar wish or intent even. But it would be putting a strained and unjust construction upon such conversations to say that thereby an assurance was given the surety that the bank would immediately upon the maturity of the note, and without further request from the surety, proceed to sue and attach the property of the principal for the benefit of the surety, and that the surety might safely rely that this would be done, or he be discharged if it was not done. To establish the giving of such an assurance it should plainly appear that both parties clearly understood that such was the meaning of their language, and an interpretation that creates so serious and unusual a liability, ought not to be given to language that does not either fairly or plainly express it, or require it as the natural and obvious inference.

Mr. Cole states the language used by Mr. Hickok thus : " If Warner would see that the note was paid at maturity he would sign it," and by Mr. Warner thus : " that the note should be paid

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at maturity, and that he would see to it." Again "he would not sign it unless Warner would see that the note was collected at maturity or paid at maturity."

"Warner and I both agreed that the note should be paid and taken up at maturity." This testimony seems more explicit than Mr. Hickok's that Warner should "see to" or proceed with the collection.

Taken in connection with the fact that Mr. Hickok resided in New York and gave that as a reason why he wished to have Warner take upon himself this duty, the natural inference would be that he relied upon Warner to collect the debt when it fell due; and if this was all the evidence in the case we might perhaps feel required to put this construction upon it. We say this even with some hesitation, for the assuming of such a responsibility would be so unusual—such an assurance would be so extraordinary—that it would seem that there ought to be something in the conversation to show explicitly that the idea was fully comprehended by Warner that he was to act without further request and for the benefit of Hickok, and that Hickok understood that he relied upon Warner's so acting, and was not expected to guard his own interests. But on the part of the defendant, Mr. Warner testifies that he made no agreement with Mr. Hickok as to the collection of the note at its maturity—that Hickok attached no condition to his signing the note—that it was taken in the ordinary course of business, as a renewal. On cross examination he says that he has no recollection of any conversation with Hickok or Cole when the note was renewed. Besides this testimony of Warner, we can not overlook the important consideration that such an agreement on the part of the bank would be unusual and contrary to the practice of banks; and that there was no motive for their assuming such a singular and burdensome responsibility, for they already had the note of Cole and Hickok for the debt and free from any such duty to Hickok.

It seems to us highly improbable that the Bank would assume such a burden on itself when it had nothing to gain by it.

Comment has been made by counsel upon the manner in which these witnesses have testified, and the bias, and the interest they are under. Cole seems to have a strong hostility to the bank

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and its directors, which may not be unreasonably thought to affect his testimony. The other two seem to testify with fairness and according to their honest convictions and recollections. The practice which seems to have been adopted by the orator in this case, of having the questions shown to the witness, and his answers prepared before hand and reduced to writing, and examined by counsel before coming before the master to testify, is one not allowable by the practice in chancery in this state, of pernicious tendency, as tending to color the testimony and adapt it to the necessities of the case, and justly subjecting the evidence so taken to suspicion. Although we do not see in the orator's testimony so taken, anything to indicate that it was either resorted to or used in this instance for an improper purpose, yet we feel that the precedent ought not to pass without receiving the censure of the court.

When witnesses testify in contradiction of each other, as in this case, Hickok and Cole on one hand. and Warner on the other, the mind naturally turns to the surrounding circumstances, to the probabilities of the two stories, and to the interests and motives of the parties as furnishing the most satisfactory means of ascertaining the truth. These we think are with the defendant.

That the bank already held Cole and Hickok's note, and had no motive for making such an agreement; that such an agreement was burdensome, involving the bank in trouble, expense, and perhaps litigation; that it was unusual and against the interest and the custom of banks: these are circumstances of much weight, and require strong and positive evidence to counterbalance them. When we add to this the positive testimony of Warner, we feel that the testimony of Hickok and Cole is not sufficient to establish that preponderance of proof which is requisite to sustain the bill.

The case is remanded to the court of chancery with a mandate affirming the decree of the chancellor.

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S. A. HOWARD v. THE TOWN OF BURLINGTON.*Exceptions. Execution. Practice. Attachment. County Court.*

A party excepting to the judgment of the county court, has thirty days from the final adjournment of the court in which to file his exceptions.

Under an order of the county court, made just previous to taking a recess, that executions on judgments consummated might issue immediately, *held*, that where a judgment had then been rendered for the plaintiff and he had been allowed exceptions thereto, but no stay of execution had been granted, he might at any time thereafter, before thirty days after the final adjournment of the court, and before filing his exceptions, waive them by giving notice thereof to the clerk, and having the entry of exceptions erased; but *otherwise*, if at the time of allowing exceptions the court had ordered a stay of execution.

CASE against the town of Burlington for the neglect of its constable, Isaac Sherwood, to have certain personal property attached by him on a writ in favor of the plaintiff against one Hawley, forthcoming to respond the judgment on said writ, and the execution issued thereon. Trial by the court at the April Term, 1862, PIERPOINT, J., presiding, upon the following agreed statement of facts.

"At the September term, 1851, of the Chittenden County Court, a suit in favor of the plaintiff against Jacob C. Hawley, then a resident of Burlington, was commenced by service of the writ by Isaac Sherwood, then legal constable of the town of Burlington, who thereon on the 16th day of July, 1851, attached as the property of Hawley, certain personal property belonging to him, worth three hundred dollars, and duly returned the writ to the court and term aforesaid; and the cause was continued from term to term until the November term, 1856, when a trial was had therein, resulting in a judgment for the plaintiff for twenty-five dollars damages, and forty-two dollars and eighty-three cents cost.

"The plaintiff at this trial took exceptions to certain rulings of the court therein, which exceptions were allowed and an entry made upon the docket as follows: 'Exceptions by plaintiff—exceptions allowed and execution stayed.'

"After the rendition of such judgment and the aforesaid entry in the docket, the court, on Saturday the 29th November,

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1856, adjourned its session for the completion of the business of the term to January 24th, 1857, having previously, on the day of such adjournment, made and caused to be entered on the docket an order in the following words :

“ November 29, 1856. By order of court, executions on judgments consummated, may issue immediately. J. S. Adams, Clerk.”

“ On the 24th of January, 1857, the court re-assembled, pursuant to such adjournment, and continued in session until the 27th of January, 1857, when it finally adjourned.

“ The plaintiff did not file his exceptions in said cause within thirty days from the 29th of November, 1856, nor at any other time ; and on the 30th of December, 1856, the plaintiff's attorney in the cause informed the clerk that the plaintiff waived his exceptions therein, and requested the clerk to erase the entry of exceptions upon the docket, and to issue an execution upon the judgment, which the clerk accordingly did ; and execution was issued upon the judgment for the damages and costs above mentioned, with twenty-five cents fee for the execution, dated December 30th, 1856.

“ This execution was on the 30th of December, 1856, delivered by the plaintiff, for collection, to Samuel Huntington, then constable at Burlington. Sherwood in 1855 became insolvent and removed with his family from this state, and has never since been in Vermont. Hawley had previously to 1855 become insolvent, and removed from the state, leaving no attachable property here.

“ Huntington could not, when the execution was placed in his hands for collection, nor at any subsequent period, find Sherwood or Hawley, or the property attached on said writ, or any other property belonging to Hawley ; and on the 6th of January, 1857, Huntington returned the execution to the office of the clerk of the court, unsatisfied, with a *nulla bona* and a *non est* return thereon ; and the execution still remains unsatisfied ; and no attachable property of Hawley, nor Hawley himself, can be found in this state.”

Upon these facts the county court rendered judgment for the defendant, to which the plaintiff excepted.

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Wm. G. Shaw, for the plaintiff.

Wales & Taft, for the defendant.

KELLOGG, J. The decision of this case depends on the answer to the question whether the plaintiff was entitled to an execution on his judgment against Hawley, on the 30th of December, 1856, when that execution was issued. It is conceded that if that execution was irregular, or was prematurely issued, the personal property attached on the original process, was not duly charged in execution, and that no action can be maintained against the defendant for the neglect of its constable who made the attachment, to have the attached property forthcoming "to respond the judgment" on which the execution was issued. The plaintiff recovered his judgment against Hawley at the November term of the Chittenden County Court in 1856, and, on the trial which resulted in this judgment, he took exceptions to certain rulings of the court, and an entry was made on the county court docket as follows: "Exceptions by plaintiff,—exceptions allowed, and execution stayed." After the judgment was rendered, and after this entry was made on the docket, the county court, on the 29th of November, 1856, adjourned its session, for the completion of the business of the term, to the 24th of January, 1857, having previously, on the day of adjournment, made an order which was entered on the docket allowing executions on judgments then "consummated" to issue immediately. On the said 24th of January, 1857, the court met pursuant to adjournment, and continued in daily session until the 27th of January, 1857, when it finally adjourned. The plaintiff never filed any exceptions in his suit against Hawley, and on the 30th of December, 1856, during the recess of the court, as above mentioned, his attorney informed the clerk of the court that the plaintiff waived his exceptions in that suit, and requested the clerk to erase the entry of the same from the docket, and to issue an execution on the judgment in the suit, which the clerk accordingly did, the execution being issued and dated on the same 30th of December, 1856. The statute provides that execution "shall not, of course, be stayed" by the allowance of

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exceptions, but it "may be stayed by order of the court on consideration of the difficulty and importance of the question," and, when exceptions are taken, they are required to be filed with the clerk "within thirty days after the rising of the court;" and, if not filed within that time, the clerk is required to erase any entry of exceptions on the docket, and to issue execution on the judgment; and it is provided that the time when such entry is erased from the docket shall be deemed the day on which the plaintiff is first entitled to execution on the judgment; Comp. Stat. p. 224-5, sec. 43, 44. The statute also provides that no execution shall issue on any judgment rendered by the supreme or county court "until twenty-four hours after the rising of the court, unless by special permission of such court;" Comp. Stat., p. 253, sec. 81; and further declares that the day on which the plaintiff shall first by law, without leave of the court, be entitled to an execution on any judgment rendered in his favor, shall be deemed the time of rendering such judgment in all cases, so far as relates to holding property attached on mesne process, and the charging of any person as bail for delivering up the body or the principal; Comp. Stat., p. 254, sec. 84. Under the decision in the case of *Paul v. Burton et al.*, 32 Vt., 148, the "*rising of the court*," when used in the statute in respect to the issuing of executions, must be regarded as being the day on which the term is closed by final adjournment, and we think that the same expression when used in the statute in respect to the filing of exceptions with the clerk, must be considered as referring to the same time. The time within which exceptions are to be filed must be the same in respect to all the judgments of any particular term, and can neither be extended nor limited in any particular case by construction. The clerk, therefore, was not authorized by the statute to erase from the docket the entry of exceptions, and to issue execution on the judgment, on the 30th December, 1856, on the ground that no exceptions were filed within thirty days after the rising of the court; and if the plaintiff on the 30th December, 1856, was entitled to an execution on his judgment against Hawley, he became entitled to it under the order made by the county court on the 29th November, 1856, allowing executions to issue imme-

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diately on all judgments consummated. But this general order, at the time it was made, had no reference to the judgment in favor of the plaintiff against Hawley, because a particular order had been made in the suit in which that judgment was rendered, staying the issue of execution on that judgment. The taking of exceptions is the act of the party, and not of the court, but an order staying execution on a judgment is always the act of the court. We have seen that the entry and allowance of exceptions does not necessarily involve a stay of execution, and that exceptions may be allowed without a stay of execution. As the taking of exceptions is the act of the party, he should be considered as entitled to waive or abandon his exceptions at his pleasure, if no adverse right is thereby affected. But an order staying execution would not necessarily fall with the abandonment of the exceptions, for it might have been made without reference or regard to the allowance of exceptions. As an order of court it is not to be controlled by a party to the suit; and, except in the particular instance in which the clerk is authorized by the statute to disregard it for the failure of the excepting party to file his exceptions within the time limited by the statute, it must remain operative until it is recalled by the court. We regard the excepting party as being entitled to waive his exceptions as well during the recess of the court as while it is in actual session, and think that the clerk might properly make an entry of such waiver on the docket whenever made; but the clerk has no authority to erase from the docket an order staying execution except in the specific case in which it is given to him by the statute. These views lead to the conclusion that the plaintiff's execution against Hawley was irregular and prematurely issued.

Judgment of the county court for the defendant affirmed.

Roberts v. Griswold.

DANIEL ROBERTS v. A. H. GRISWOLD.

Guaranty. Consideration. Notice. Partnership.

The plaintiff having been retained by G. as his counsel in a law suit, and having already rendered services therein, the defendant, in a letter to the plaintiff, stated that he would hold himself accountable that G. should pay the plaintiff for all the services he had or might render him in such suit. An action having been brought upon this guaranty, and the case having been referred, the referee reported that the plaintiff in reliance upon this guaranty continued his services in the suit upon the faith that the defendant would pay agreeably to the terms of the letter; and, also, that the defendant expected and understood the plaintiff would continue his services in the suit after the letter was written, according to its terms. *Held*, that there was a sufficient consideration for the guaranty; that it sufficiently appeared that the defendant had notice of its acceptance by the plaintiff; that it was not necessary that the consideration of the guaranty should be expressed in writing; and that the guaranty covered both the past and future services of the plaintiff in the suit, and also his disbursements for the ordinary clerk and court fees therein.

Held, also, that the fact that by the terms of a law co-partnership formed by the plaintiff subsequent to the guaranty, but before the performance of the plaintiff's services upon the faith thereof, his partner was entitled to share with him in the pay for such services, constituted no ground of defence to the plaintiff's action upon the guaranty, the plaintiff having personally rendered all the legal services contemplated by it.

ASSUMPSIT upon a guaranty. The cause was referred, and the referee reported the following facts:

The plaintiff's claim was for services and disbursements as attorney and counsellor, in the defence of a suit in favor of one Sheldon against Daniel B. Griswold, brother of the defendant. The disbursements charged in the plaintiff's account amounted to nine dollars and sixty-four cents, and consisted of cash paid the fees of the clerk of the court in respect to such suit during its pendency. The referee found that the plaintiff's charges were for services actually rendered, and disbursements made, in such suit, and that they were reasonable and proper, and no objection was made to them by the defendant in that respect, but the defendant claimed before the referee that he was under no liability to the plaintiff for any part of his account.

The plaintiff was originally retained in said suit as attorney by Daniel B. Griswold at its commencement, in 1847. At that time the plaintiff resided in Manchester, in this state, where he

Robert J. Griswold.

retained till 1855, when he removed to Burlington. Daniel B. Griswold resided in Benson, in this state, from 1847 till 1855, when he removed to Michigan, where he resided up to the hearing before the referee in 1861. The defendant had always resided in Whitehall, N. Y. The plaintiff's account was charged to Daniel B. Griswold until November 1st, 1855, when the plaintiff formed a co-partnership with L. E. Chittenden, in business as attorneys, and after that time, the charges were made on the books of Roberts & Chittenden, to the present defendant, A. H. Griswold. The plaintiff alone rendered the services charged in his account, but by the terms of co-partnership between him and Chittenden, Chittenden had an equal interest with the plaintiff in so much of the account as accrued after they became partners.

The plaintiff and defendant previously to October, 1855, had considerable correspondence in reference to the said suit between Sheldon and Daniel B. Griswold, in which correspondence the plaintiff very persistently urged the defendant to pay him his account for services and disbursements in that cause. On the 24th of October, 1855, the defendant wrote the plaintiff a letter, which was claimed by the plaintiff to contain the guaranty upon which this action was brought. In it, after reciting the disappointment of his brother in not receiving some fifteen hundred dollars which he expected, and upon which the defendant had based his previous verbal assurance of the plaintiff's getting his pay, the defendant used the following language: "*I can assure you that he (referring to Daniel B.) is perfectly good, and will hold myself accountable that he shall pay you for all the services you have or may render him in the suit with Sheldon.*"

The defendant after this letter of October 24th, 1855, in reply to numerous dunning letters from the plaintiff, still referred the plaintiff to his brother, Daniel B., for payment, and the plaintiff after that wrote two letters to said Daniel B., at his residence in Michigan, agreeably to the defendant's suggestions. From and after the receipt by the plaintiff of the letter of the defendant of October 24th, 1855, the plaintiff relied upon the defendant's engagement contained in that letter, to pay his bill of services in said suit, and his services therein subsequent thereto

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were rendered upon the faith that the defendant would pay agreeably to the terms of that letter; and the defendant expected and understood that the plaintiff would continue his services in the suit after that letter was written, according to its terms.

The defendant insisted before the referee, that he was in no manner liable to defend, or pay the expenses of, the suit of Sheldon against Daniel B. Griswold, or in any manner interested in the defence thereof, except what the law would imply from his letter of October 24th, 1855; that the plaintiff never gave the defendant any notice that he relied upon any guarantee of the defendant; that the services rendered after the letter of October 24th, 1855, were rendered by him while he was a partner of, and in connection with, Chittenden, and were charged directly to the defendant without his knowledge; that such guarantee was without consideration and no intimation was ever given by the plaintiff to the defendant or Daniel B. Griswold, that the plaintiff would render no more service upon the credit of Daniel B., in that suit; and further, that if the referee should find that the letter of the defendant of October 24th, 1855, contained any guarantee at all, it was simply a conditional guarantee of the soundness and continued responsibility of Daniel B. Griswold.

The cause was tried by the court upon this report, at the April term, 1862, PIERPOINT, J., presiding. The county court *pro forma* rendered judgment for the defendant, to which the plaintiff excepted.

The plaintiff, *pro se*.

L. Underwood, for the defendant.

BARRETT, J. The defendant's liability, which the plaintiff seeks to enforce in this suit, is claimed to be created by his letter of October 24th, 1855. The expression, constituting the alleged guaranty, is the same as to the then past services of the plaintiff, as to services thereafter to be rendered by him in the suit of Sheldon v. Daniel B. Griswold. Hence, so far as *the terms used* are concerned, the defendant assumed the same liability for the

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past as for the future services of the plaintiff. Though it was urged before the referee, it is not claimed in the argument before this court, that the guarantee extends only to the responsibility of the said Daniel B. Griswold; and the argument has proceeded upon the ground that it undertakes for the ultimate payment of the plaintiff's charges. But it is now urged that no such consideration is shown, as is necessary to give validity to the guaranty. The terms of the guaranty imply that it was in the contemplation of the defendant, that the plaintiff was thereafter to render further services in the same suit; and the report expressly states that "the defendant expected and understood that the plaintiff would continue his services in said suit after said letter was written according to the terms of said letter." The letter closes by saying that "He" (said Daniel B.) "expects to be able to get another trial, and if he can have a fair one he must certainly come off triumphant." Now "the terms of said letter," according to which "the defendant expected and understood that the plaintiff would continue his services," were that the defendant would hold himself accountable that he (the said Daniel B.) should pay the plaintiff for all the services he had or might render, in the suit with Sheldon.

The consideration then, so far as it consisted in the rendering of future services, went to the entire undertaking of the defendant, and gave it the same effect in fixing his liability to pay for the past, as for the future services. The report also shows that from and after the receipt of said letter, the plaintiff relied on the defendant's engagement, and the services subsequent thereto were rendered upon the faith that the defendant would pay agreeably to the terms of said letter. So far then as the matter rested in the understanding and expectation of the parties, there was entire concurrence between them.

It is not denied that the rendering of future services may be a good consideration to uphold a promise to pay for services already rendered. But it is well understood that in order to bind the defendant upon his proposition, it must appear that he was notified of the plaintiff's acceptance of it and reliance upon it. We think this amply appears. The language above quoted, that "the defendant expected and understood that the plaintiff would con-

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tinue his services in said suit after said letter according to the terms of said letter," necessarily involves the fact that the defendant had been so informed by or in behalf of the plaintiff. There is no accounting for his expectation and understanding otherwise. The proposition having thus been made and accepted, and the defendant notified of such acceptance, when the services were in fact rendered in reliance upon said engagement of the defendant, and upon the faith that he would pay agreeably to the terms of said engagement, the duty of the defendant to pay according to said engagement would seem to be consummated and fixed.

But it is claimed again that the consideration should appear in writing in order to give validity to the guaranty. This must either mean that the acceptance of the defendant's proposition must be in writing, or a correlative undertaking on the part of the plaintiff to render future services must have been in writing.

We can readily understand that this might be required in some cases, as when the guaranty itself did not embody substantially the material and effective terms of the contract, and where resort to parol evidence would be necessary in order to show what the contract was in its terms and effect. But we do not understand that this has ever been required, when all that is to be done by the other party is merely to accept the proposition in the terms in which it is made, and to perform the consideration either by paying or doing the thing proposed. In the present case the services thereafter to be rendered constitute the consideration, and this is clearly indicated on the face of the defendant's proposition.

As to the point taken in argument, that the consideration is exhausted by the promise to pay for future services, and inasmuch as it is not shown that the plaintiff would not have performed them without the guaranty of the defendant and on the sole credit of his brother, it is sufficient to say that it appears affirmatively that the consideration goes to and affects the entire undertaking of the defendant, as has been before shown. This being so, the plaintiff had no occasion to go further and show negatively, that he would not have performed the future services, except upon the condition that the defendant would pay him for the past as well as for the future services.

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The defendant claims that "it was the plaintiff's duty to settle and adjust his account with the principal, or at least, attempt to do so, before he called on the surety." Without discussing the correctness of this position, we think the case shows that the plaintiff substantially performed that alleged duty. The report states that "the defendant, after said letter of October 24th, still referred the plaintiff to his brother, Daniel B., for payment, and the plaintiff after that wrote two letters to said Daniel B. at Michigan, where he now resides, requesting payment of his bill, but has never received any pay from him on his said account. These letters were written to Daniel B. in 1859 and 1860 by the plaintiff agreeably to the suggestion of the defendant who referred him to Daniel B.," which sufficiently implies that the plaintiff sent his bill to said Daniel B., as the basis of his request for payment of it. And it moreover shows that he did in this respect what the plaintiff required of him, for he acted "agreeably to suggestions of the defendant." We think, therefore, the case shows that the plaintiff did all that was necessary to entitle him, even under the defendant's view, to fall back on the guaranty.

It is further insisted in behalf of the defendant, that, by reason of the formation of the partnership between the plaintiff and Mr. Chittenden, on the 1st of November, 1855, *the plaintiff* performed no services for which he could recover, in his own name, and so, as a result, he has not executed the consideration upon which the right to enforce the guaranty depended.

The services, up to that time, had been performed by the plaintiff, and, by the contract of guarantee, were thereafter to be performed by him. The employment was of the plaintiff alone. The contract of guaranty was with the plaintiff alone. Chittenden was no party to either, and sustained no relation of privity either to the defendant, or his brother Daniel B. Mr. Roberts rendered personally the services contracted for, and contemplated by the guaranty, in fulfilment of it on his part. This being so, it is difficult to see upon what ground, either of law or morals, the fact that, by an arrangement between the plaintiff and Mr. Chittenden, the latter was to share with him a part of the pay for such service, can be held to operate as a discharge to the defendant of the liability which the guaranty would have

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imposed on him, in case such partnership had not been formed.

The count is special on the guaranty, and under this the plaintiff is entitled to recover, if at all. Roberts & Chittenden, as partners, could not recover on it in a joint action, however it might be if they had brought a suit directly on their charges, either in book account or general assumpsit. See *Maynard et al. v. Briggs*, 26 Vt. 94, and cases there cited.

The point made as to charges for disbursements by the plaintiff, is sufficiently answered, by the statement in the report, that "the charges of the plaintiff are for services actually rendered and disbursements made in said suit, and in amount are reasonable and proper, and no objection is made to them by the defendant in that respect. But it is claimed * * * that he is under no liability to the plaintiff to pay any part of his said account." In the closing part of the report, in the summary of grounds and points taken by the defendant, it appears that no such point was made before the referee. Hence no facts are reported having reference to that class of items beyond the fact that the disbursements were made by the plaintiff, as attorney and counsellor in defence of the suit of Sheldon against said Daniel B.

We think it is too late to start the point for the first time in this court, upon the case as it comes before us. Yet we are all agreed that, in this state, the payment of such fees is an incident of the services to be rendered by an attorney in the position occupied by Mr. Roberts in that suit, and fairly comes within the scope of the guaranty.

The judgment of the county court is reversed, and judgment rendered for the plaintiff for the sum reported by the referee.

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PARKMAN T. DAVIS v. JOHN K. CONVERSE, BUEL W. SMITH,
AND CHARLES J. ALGER.

[IN CHANCERY.]

*Principal and Surety. Promissory Note. Usury. Foreclosure
of Mortgage. Chancery. Statute of Limitations.*

A promissory note is not void as to a surety, on the ground that, without his knowledge, at the time of the delivery of the note the principal agreed to pay, and afterwards did pay, the holder an illegal rate of interest thereon.

If a surety upon a promissory note give a mortgage to the holder to secure its payment, in a proceeding in chancery to foreclose such mortgage the principal upon the note should be made a party.

If, in such a foreclosure case, the principal is not made a party, and he has made payments of usury *eo nomine* upon the mortgage note, on the face of which no usury was included, and he appears before the master on the assessment of the amount due, and claims that such usury be applied as payments towards the principal of the note, he will be estopped from afterwards recovering such usury of the person to whom it was paid, and the defendants in the foreclosure proceeding are entitled to have the benefit of such application.

But if six years have elapsed since the payment of the usury before the principal signifies his election to have it applied as a payment upon the note, his right to make such election is barred by the statute of limitations.

PETITION for the foreclosure of a mortgage executed September 26th, 1854, by the defendant Converse to the petitioner, to secure the payment of a promissory note for one thousand dollars, dated February 26th, 1851, signed by Charles P. Allen, James H. Allen and the defendant Converse, and payable to the petitioner or order, in one year from its date, with interest. The defendants, Smith and Alger, were made parties by reason of having received subsequent mortgages or assignments of the property in question, subsequent to the petitioner's mortgage.

The petition was taken as confessed for want of an answer, and the cause was referred to a master for assessment of the amount due on the mortgage. The hearing before the master was had on the 7th of October, 1861, and from the evidence before him, he reported the following facts.

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On the 26th of February, 1851, Charles P. Allen borrowed of the petitioner one thousand dollars, and gave him therefor the note described in the mortgage in question. Upon this note James H. Allen and Converse were merely sureties. At the time of this loan, Charles P. Allen verbally agreed to pay the petitioner nine per cent. interest thereon. Charles P. Allen, in accordance with this agreement, paid the petitioner nine per cent interest yearly, down to and including the year 1857, and, on the occasion of each payment, an endorsement of the payment of one year's interest was made upon the note, or a receipt to the same effect was given by the petitioner to Allen. Allen made these payments solely as interest, and with no intention or expectation that any portion of them should be applied towards the principal of the note. Neither did Charles P. Allen ever make any request to the petitioner to have the excess of legal interest so paid by him, applied in payment of the principal of the note, until the hearing before the master, when, being a witness for the defendants at such hearing, he claimed and requested that such excess of interest should be applied in part satisfaction of the principal of such note. From the time of the payments of such illegal interest, Allen never made any claim or demand to recover the same of the petitioner.

The master further reported that in September, 1854, Charles P. Allen having become pecuniarily embarrassed, the petitioner threatened to put the note in suit against Converse unless he would give him additional security for the note, whereupon Converse executed to the petitioner the mortgage in question. Converse at the time this mortgage was executed, had no knowledge of any agreement on Allen's part to pay the petitioner more than six per cent. interest, or that he had paid a higher rate, but he supposed that Allen had simply paid that rate of interest.

On the hearing before the master, the defendants insisted that they were entitled to have all excess of interest paid by Allen, applied as payment towards the principal of the note. The petitioner, on the other hand, claimed firstly, that only Charles P. Allen had the right to insist that such payments should be applied towards the principal, and that as he was not a party to this proceeding, the defendants could take no advantage of

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such right; and secondly, that so far as concerned such payments of illegal interest as were made more than six years previous to the hearing before the master, neither the defendants, nor even Charles P. Allen himself, had the right against the petitioner's objection, to have them applied as payments upon the principal of the note.

The master reported the amount due upon the note upon the three several bases above named.

PIERPOINT, Chancellor, at the September term, 1862, rendered a decree of foreclosure for the largest sum reported by the master, from which decree the defendants appealed. The case was twice argued by

Wm. G. Shaw, for the orator.

M. L. Bennett, for the defendants.

POLAND, Ch. J. The claim of the defendant Converse, that the orator's note is illegal and void as to him, on the ground of the agreement by Allen, the principal, to pay more than legal interest thereon, which was not known by the surety at the time of executing the note, is settled against him by former decisions of this Court; *Richmond v. Standclift et al.*, 14 Vt. 258; *Bank of Middlebury v. Bingham et al.*, 33 Vt. 621.

If this were otherwise, it would seem quite too late for the defendant to make the objection, after allowing the bill to be taken as confessed against himself, upon the accounting before the master.

The questions now before the Court in the case, arise upon the master's report, in respect to deductions claimed against the mortgage note, for usurious interest paid by Allen, the principal. Allen, the principal on the note, not being a party to the mortgage, is not made a defendant in this bill of foreclosure, and as the usurious interest he paid was not included in the note itself, and therefore, when paid, was not endorsed upon the note, the orator claims that no part of such payments can be applied to reduce the sum due the orator, which the defendant Converse must pay to redeem the mortgaged premises. It is claimed by the orator

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that the decisions in this State go to the extent of holding, that if a suit were brought by the orator on this note against Converse alone, he could not set up in defence such payments of usurious interest by his principal, and that he cannot be in any better condition in this proceeding to foreclose the mortgage given by him. Whatever difficulties there may be in the way of a surety, when sued alone in an action at law, setting up offsets or counter claims in favor of the principal against the creditor, we think they do not apply here.

Converse mortgaged his land to the orator to secure Allen's debt, and in any proceeding in equity to foreclose the mortgage, Converse should be allowed to redeem by paying what is justly due upon Allen's debt to the orator.

Properly Allen should have been made a party defendant in the suit, for the reason that he might be a necessary party to the accounting before the master, and had the objection been taken in time the court would probably have compelled the orator to have brought him in. But the objection not being made in the outset, the court will proceed without him, provided a decree can be made which will properly protect the rights of the parties already before the court.

If Allen were a party, as he should have been, then it is not claimed but that he would have the right to claim that all payments of usurious interest made by him to the orator, which he could legally compel the orator to repay, should be deducted from the mortgage debt; and the orator by omitting to make Allen a party, ought not himself to obtain any advantage thereby, provided his own rights can be secured. The usurious payments made by Allen to the orator not being for usury included in the note, and so not endorsed upon the note, created a legal ground for Allen to sue and recover the same from the orator, and this without regard to whether the note given the orator for the money borrowed and the lawful interest, had been paid or not. To allow Converse to have the payments applied in deduction from the orator's debt, and at the same time leave the orator liable to an action by Allen for the same, would be manifestly unjust. But it appears to us that Allen by coming before the master and claiming to have such payments applied toward

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the extinguishment of the mortgage debt, and having them so applied, effectually precludes all claims by himself to again recover the same by action, and furnishes conclusive record evidence for the orator's protection against any such action.

A portion of these payments of usurious interest by Allen were made more than six years before the time of hearing before the master, where for the first time, as appears, any claim was ever set up against the orator for such payments, or any claim to have them applied against the mortgage debt.

The orator insists that all claim for these payments, either by action, or by way of deduction, is barred by the statute of limitations, and that only those payments made within six years can be allowed.

This depends wholly upon the character of such payments, whether they were really payments upon the debt when made, or whether they created an independent substantive claim in favor of Allen, the party paying them, to be enforced by suit, or if allowed against the mortgage debt, they come in rather as an equitable set-off, than as a payment.

If they are to be treated as payments upon the debt, when made, then, of course, they are wholly unaffected by the statute of limitations; if they are of the character of a counter claim, or set-off, and Allen's right under them is to stand upon the same principle, as if he was endeavoring to enforce it by an action, then all beyond six years are bound by the statute. That Allen has the right to treat these payments as creating an independent substantive cause of action in his favor, and to enforce the same by an action against the orator, and to refuse to allow them to be applied as payments upon the debt, is conceded, but it is claimed that he is entitled to his election, to treat them in that manner, or as payments upon the debt.

This must be determined by a reference to former adjudications of the court, where the subject of such payments has been considered. It seems now to be settled by repeated decisions, that where usury is included in a note or other security, and when paid is endorsed upon the note, it is to be considered as a payment upon the note itself, and no action can be maintained to recover back the usury paid, so long as there remains due any

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part of the principal, and lawful interest, but that where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not endorsed upon the note, but is paid as usury *eo nomine*, it is otherwise, and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid. *Gross v. Albee*, 19 Vt. 540; *Nelson v. Cooley*, 20 Vt. 201; *Day v. Cummings*, 19 Vt. 496; *Nichols v. Bellows*, 22 Vt. 581; *Ward v. Whitney*, 32 Vt. 89.

In many of the cases this right to recover back usury paid has been said to be a personal right in the party paying, which no other could enforce for him, and sometimes it has been treated as being rather in the nature of a tort than a contract.

Whether this latter view be well founded or not, it shows clearly that the right has been fully regarded as an independent claim in the party making such payment, and disconnected from the original debt.

And though it has been held in many of the cases, that in an action for the debt itself, or to enforce a mortgage security for the debt, such payment may be set up as a defence to that extent, yet this is no more than might be done with any other valid claim the debtor might have against the creditor, and by no means proves that the debtor has the right in all cases, and in all respects to treat it as strictly a payment upon the debt.

We are not aware of any case where it has been held that such payment could be set up by way of defence, to any greater extent, than it could be enforced by an action to recover it back. It is said that in *Ward v. Sharp*, 15 Vt. 118, the defendant was allowed to claim a deduction of usury paid, where his right to recover it back was barred by the statute, but it will be seen by a reference to that case, that the item of usury claimed to be thus barred, was usury included in the note itself, and under all our decisions, would be a proper payment upon the debt itself. We are not aware of any reported case, where the precise point here raised, has been decided, but we have been furnished with the manuscript opinion of Judge Royce, in the case of *Boynston v. Nash*, decided in this county in 1851, in which he holds, that

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the statute of limitations is a good bar to a claim founded upon such usurious payments, even in equity, and the record of the case shows that judgment was given in accordance with such opinion.

This decision seems to us to be in harmony with the general tenor of all the decisions upon the subject of such payments, while to hold that the debtor may, after he has allowed his claim to sleep until it is barred by the statute, set it up as a payment upon the debt, would conflict with the spirit of numerous adjudged cases.

Nor do we see that there is any good ground for the debtor to claim that he is harshly treated, when he is allowed to deduct to the same extent that the law would afford him redress by action. And it seems to us that the general purpose and spirit of the statute of limitations, as a statute of repose, and a protection against stale and unjust claims, is as justly and fairly applied to such a claim as any other, and that such payments not made on the debt itself, and where evidence of them rests in parol, may as reasonably be expected to be set up without just foundation as any.

The decree of the chancellor is reversed, and the case remanded with directions to deduct the payments of usurious interest made by said Allen to the orator within six years before the time of taking the account before the master, (October 7th, 1861,) and after making such deduction, to enter a decree of foreclosure for the orator in the usual form.

The orator to be allowed no costs in this court, and the defendant's costs in this court to be deducted from the decree.

Hard v. Edgell.

E. R. HARD v. LEVI A. EDGELL.

Statute of Limitations. Assignment for the benefit of creditors.

The receipt by an assignee for the benefit of creditors of money upon one of the assigned demands, has no effect to remove the bar of the statute of limitations upon the debts of the assignor, for the benefit of which the assignment is made.

Neither does it alter the effect of such receipt in respect to the statute of limitations, that the assignor himself, acting as clerk for the assignee, receives such money, and makes a memorandum on the assignee's books of such receipt.

ASSUMPSIT upon four promissory notes signed by the defendant, dated May 25th, 1851, and payable four, five, six and seven months after date, respectively, to the order of R. W. Howes & Co., and by them endorsed to the plaintiff confessedly for the sole purpose of collection for the benefit of the payees. The action was commenced September 8th, 1859. The defendant pleaded the statute of limitations, and the cause was tried by the court at the April Term, 1862, PIERPOINT, J., presiding.

It appeared on trial, that on the 8th of January, 1852, the defendant, being indebted to R. W. Howes & Co., upon the notes in suit, and also to one Reed, and being insolvent, made an assignment of all his accounts and demands against all persons to Wires & Peck, attorneys, in trust for said Howes & Co., and Reed. This assignment recited that Howes & Co. and Reed had agreed to discharge their claims against the defendant for fifty per cent. of the amount thereof, and provided that Wires & Peck should collect the assigned demands, and pay over the money to Reed and to Howes & Co., in proportion to their respective claims, until they should be half paid, when the residue of their claims should be cancelled, and the balance, if any, remaining in Wires & Peck's hands after paying the expenses of collecting, was to be accounted for to the defendant, but that the assigned demands were to belong to Wires & Peck for the purpose above named, and be subject to their sole management.

This assignment was accepted by Wires & Peck, with the

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assent of Howes & Co., and Reed, and the assignees caused all the assigned claims to be drawn off upon their docket, and at the same time opened an account upon their ledger with Howes & Co. and Reed jointly, and proceeded to collect the assigned demands. The collections as made were entered first upon the docket in connection with the respective demands collected, and from thence usually credited upon the ledger to Howes & Co. and Reed, upon the joint account above mentioned.

From the date of the assignment until June, 1852, the defendant rendered Wires & Peck some voluntary assistance in collecting the assigned demands. On the 2nd of June, 1852, he became their general clerk, and after that time, in that capacity, aided them in the collection of such assigned demands, and in transacting the business relating to the assignment, just as he assisted them in their other business, that is to say, according to their directions. While acting as their clerk, he in several instances made entries upon their docket and ledger, relative to the demands assigned by him to them. The only entry of that character, however, made by him within six years next preceding the commencement of this suit, was made upon the docket in reference to an assigned claim against one Varney. It was as follows, the portion in brackets not having been made within six years. [*August 16, 1853. Defaulted, execution issued same day.*] *Received October 4th, 1863, of defendant (Varney,) eleven dollars and eighty-three cents, and credited damages to Reed and Howes' assignment.* No entry, however, was made upon the ledger in the account with Reed and Howes & Co. by the defendant or any other person, of the payment so entered upon the docket.

Upon these facts the plaintiff insisted that his claim upon the notes in suit was not barred by the statute of limitations, but the court held otherwise, and rendered judgment for the defendant, to which the plaintiff excepted.

The plaintiff *pro se*, with whom was *Wm. W. Peck*.

D. S. Heald and *Wm. G. Shaw*, for the defendant,

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BARNETT, J. The question in this case arises under the issue made upon the statute of limitations.

After making the assignment, set forth in the bill of exceptions, along up to June, 1852, the defendant gave some voluntary assistance to Wires & Peck in collecting the assigned demands. On the 2nd day of June, 1852, he became a general clerk in the office of Wires & Peck, and so continued till October, 1853. As such clerk he performed service for them in and about the business of their office; a part of which business was that of making collections of said assigned demands. Of the money collected thereon the last remittance to Howes & Co. was made July 27th, 1852. The only transaction under, or in reference to, said assignment, that appears to have taken place within six years next prior to the bringing of this suit, was October 4th, 1853. Among the demands assigned was one against Varney, which had been entered in the office docket of Wires & Peck soon after the assignment. Upon the docket of this demand there is an entry in the defendant's hand writing:

"August 16th, 1853, defaulted, execution issued same day."

This was made more than six years before the bringing of this suit. There is another entry in the defendant's hand writing, upon the same docket entry of the demand:

"Received, October 4th, 1853, of the defendant, \$11.83, and credited damages to R. & H. assignment."

Did the receiving of the payment on said execution, and the making of said entry upon the docket by the defendant, as the clerk of Wires & Peck, operate in law to remove the bars of the statute? We think not.

Did the receipt of that money by the assignees operate to remove the statute bar, as against the assignor? We should not feel warranted in so holding, unless on the authority of some adjudged case. None has been adduced, and we think none now exists. The case of *Burger v. Durvin*, 22 Barb. 68, in which EMOR, J., delivered the opinion, at most, has reference to a payment made by the assignees upon a debt secured by the assignment, and in no view purports to decide that the receipt of money by the assignees from a debtor, upon an assigned

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demand, operates to remove the bar of the statute that has run upon a debt secured by the assignment.

In view of principles made familiar by a long course of judicial decisions, it would hardly seem warrantable to undertake, by discussion, to make the proper answer to be given to each of the above questions more palpable than it is upon the mere propounding of the questions themselves, in connection with the facts on which they are predicated.

The judgment is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF FRANKLIN,
AT THE
JANUARY TERM, 1868.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. JOHN PIERPOINT,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } **ASSISTANT JUDGES.**

Soule v. Austins.

A. J. SOULE v. A. N. AUSTIN AND A. M. AUSTIN.

R. R. SHERMAN v. ALBURN MEARS.

[TWO CASES.]

County Court. Supreme Court. Wilful and Malicious Act or Neglect. Exceptions. Officer. Receipt. Attachment. Trover.

In an action where the county court may grant a certificate that the cause of action arose from the wilful and malicious act or neglect of the defendant, &c., the allowance or refusal of such a certificate is ordinarily a matter resting in the discretion of the county court, and their decision can not be revised by the supreme court.

But it is otherwise, if the county court grant such a certificate where from the form of the action none can be legally granted, or if they refuse one upon the ground that the form of action does not allow it.

Though, where an officer has taken a receipt for property attached, and has allowed it to go back into the debtor's possession, he is, by a legal fiction, permitted to maintain trover for it, yet the failure of the receiptors to return the property is substantially a breach of contract and not a tort, and a certificate can not properly be given in such an action of trover, that the cause of action arose from the wilful and malicious act or neglect of the defendant, &c.

EACH of these cases was trover upon an officer's receipt. In the case of *Soule v. Austins*, the facts were as follows: The plaintiff, as deputy sheriff, having in his hands for service a writ against the defendants, on the 22nd of April, 1861, went to their residence in Milton, and informed them, that he had such a writ, and must attach personal property thereon. A. M. Austin then owned fifty-three cows, which he had leased with his farm to one Barrett, for one year from March 15th, 1861, and which were then in Barrett's possession under such lease. A. N. Austin at that time owned and had in his possession five horses and four covered buggies. The plaintiff did not designate any particular horses, buggies or cows as the ones which he would attach or have named in the receipt, but it was agreed between him and the defendants that they should execute to him a receipt for two buggies, two horses, and four cows, and that he should make return on the writ that he had attached such

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property thereon. The receipt was accordingly immediately executed, and the defendants therein acknowledged the receipt of such property, as having been attached by the plaintiff on that writ. By the terms of the receipt the defendants promised to return the property to the plaintiff on demand, and the officer made return on the writ pursuant to the aforesaid agreement. No particular cows, horses or buggies were designated by the receipt or return, nor intended by the parties in making such agreement. The plaintiff took the receipt, but took no possession or control of, or did anything to, any of the property named in it.

For more than a week previous to the 28th of June, 1861, the defendants knew that they were insolvent, and must soon fail. While in this situation the plaintiff called on A. N. Austin for another signer to the receipt. Austin, in order to induce him to forego such request, falsely told the plaintiff that he was perfectly safe, and that he ought not to ask for another receipt. On the 28th of June, 1861, the defendants failed, and all their attachable property, including A. M. Austin's cows, leased as above mentioned, was either assigned by them to such creditors as they saw fit to prefer, or was attached by other creditors. A. N. Austin actively assisted in procuring attachments to be made of his horses, in order that certain creditors, whom he desired to prefer, might have their claims secured by such attachments, knowing that by so doing, and by the other attachments and assignments of his and A. M. Austin's property, the plaintiff would be left without security. During the time the defendants were expecting to fail, and on the day they failed, they might, if they had seen fit, have set apart two covered buggies, and two horses, and placed them in the plaintiff's possession, and have thus far secured him for that portion of the property attached and receipted, and they might also have assigned to him two cows, subject to Barrett's right to them under the lease. The suit in which the plaintiff attached the property in question, was at the time of the trial in this case, still pending.

The plaintiff requested the court to adjudge that the cause of action arose from the wilful and malicious act or neglect of the defendants, insisting, first: that the acts of the defendants,

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while in contemplation of bankruptcy, in assigning the property attached or procuring it to be attached, or aiding therein, so as to give a preference to other creditors and prevent the plaintiff from retaking it, was a wilful and malicious act or neglect; secondly, that the act of A. N. Austin, when expecting to fail, in falsely representing to the plaintiff that he was perfectly safe, &c., and also his neglect at that time to return the property attached to the plaintiff, justified such a certificate against him; thirdly, that the defendants, anticipating their own failure, and having knowledge that the property receipted would soon be attached, by omitting to return the property to the plaintiff, but allowing it to remain where it could be attached by other creditors, *wilfully neglected* to keep and redeliver the property attached, and therefore were liable to have such a certificate granted against them.

The county court rendered judgment for the plaintiff for \$ damages and costs, and, in regard to the motion for the certificate, the court considered that the facts above stated did not tend to show, and would not legally sustain a judgment, that the cause of action arose from the wilful and malicious act or neglect of the defendants, or either of them, and therefore denied the motion, subject to a rule, that if upon the hearing of the exceptions in the supreme court, that court should be of the opinion that the facts would legally sustain a judgment granting the motion, then that judgment should be rendered as of the then present term of the county court, that the cause of action did so arise, &c. To the decision of the county court denying the motion and certificate, the plaintiff excepted.

In the case of *Sherman v. Mears*, the facts were substantially similar to those in that of *Soule v. Austins*, with the exception that in the former the property in question, three hundred sheep, was actually attached by the plaintiff, but afterwards given up to the defendant on the execution of the receipt. The court rendered judgment for the plaintiff for \$ and costs, and rendered the same judgment in respect to the motion for the certificate in *Sherman v. Mears* as in *Soule v. Austins*, to which the defendant, Mears, excepted.

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H. S. Royce, Hubbell & Dewey, W. C. Wilson, and James S. Burt, for the plaintiffs.

H. B. Smith, for the defendants.

POLAND, CH. J. These cases do not in our judgment present any question of law decided by the county court, which this court can revise. The granting or refusing a certificate might become a legal question so as to be brought up on error from the county court. If the county court were to grant a certificate in a case where, from the form of action, none could be legally granted, or if they were to refuse one upon the ground that the form of action would not allow it, undoubtedly such decision might furnish proper ground for exception or writ of error to this court.

But in an action where the county court may grant a certificate, if the evidence shows the cause of action arose from the wilful and malicious act or neglect of the defendant, the allowance or refusal of a certificate becomes necessarily a matter of fact for the decision of the county court, requiring the exercise of the judgment and discretion of that court, which this court can not revise; *Robinson v. Wilson*, 22 Vt. 35.

The cases might be disposed of without further observation, but as the counsel have argued the propriety of granting certificates in such cases, it may not be out of place for us to state our view in relation to the action of the county court.

The statute is intended to apply to cases of tort, and not to breaches of contract. Its object is two-fold, partly remedial, partly punitive; to furnish a more effectual remedy to a party who has suffered injury from the wanton and malicious act or conduct of another, and to punish such offender for such wanton and wicked violation of another's rights.

Under our system of attaching property on *mesne process*, whenever the property is left by the officer in the hands of the debtor, by his procuring a receipt for it, it is universally understood that the officer relies for his indemnity upon the receipt,

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and not upon the property. When left in the debtor's hands it is liable to attachment by other creditors, and to sale by the debtor, and the object in procuring it receipted is to give the debtor back his property, by his furnishing a security in its place. And although in this state the officer has in form been allowed to treat the receiptor as bailee of the property for him, and maintain trover against him for non-delivery on demand, yet this has been rather a legal fiction, and the receipt has been treated substantially as a contract between the receiptor and officer, measuring and governing their respective rights. This was carried so far in the case of *Brown v. Gleed et al.*, 33 Vt. 147, as to allow an officer to maintain trover upon an officer's receipt, where it was shown that the property had been disposed of by the consent of the officer. This was held upon the ground, that it appeared that this consent was given upon the expectation of all parties that the receiptors were to be liable to the officer upon the receipt.

The sustaining of trover in that case was certainly going quite wide of the ordinary principles governing that action, and the decision was made upon the ground that such form of action had always been allowed on officers' receipts, although they were purely matters of contract between the parties.

In the case of *Soule v. Austins*, no specific property was ever attached, and though the defendants had property of the kind named in the receipt to a greater amount than that receipted, yet it was never separated and set apart, or taken possession of by the officer. In fact it was never attached, and though the receiptors might be estopped by their receipt to deny that, so far as maintaining the action was concerned, they were not, on the plaintiff's application for a certificate.

In the other case of *Sherman v. Mears*, the sheep were actually attached, and went back into the defendant's possession, he giving his receipt to the officer for the same.

But as already said, we think the officer must be regarded as having yielded up his claim to the property as between him and the debtor, relying upon the obligation and security of the receipt, and that any failure to meet that must be regarded merely as a breach of contract, and not a tort.

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What has been said is also a sufficient answer to the claim of the plaintiff's counsel, that certificates should have been granted on the ground that the defendants held the property, for the conversion of which they were sued, in trust for the plaintiffs.

Exceptions dismissed.

A. R. DOYAN v. SCHOOL DISTRICT NO. 8 IN MONTGOMERY.

School. Pleading.

In an action to recover for the breach by a school district of their contract of employment of a school teacher, it is not necessary to aver in the declaration that the plaintiff had procured from the town superintendent a certificate of qualification, as required by sec. 12, chap. 20, Comp. Stat.

ASSUMPSIT for the breach by the defendants of their contract of employment of the plaintiff to teach their school. The declaration contained no averment that the plaintiff had procured any certificate of qualification to teach, as required by section 12, chap. 20, Comp. Stat.

The defendant demurred to the declaration. The county court at the April term, 1862, ALDIS, J., presiding, overruled the demurrer, to which the defendant excepted.

Child & Brigham, for the plaintiff.

Edson & Rand, for the defendant.

BARRETT, J. The declaration counts on a contract with the plaintiff to teach a district school for three months. The alleged defect in the declaration is the want of an averment of having procured the certificate required by Comp. Stat., chap. 20, sec. 12. That provision provides for an incident, that supervenes upon the contract, and does not necessarily enter into its terms.

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If that incident is not shown to have been complied with, the contract becomes void. But this is matter of evidence pertaining to the remedy, and need not be averred in the declaration. It stands upon the same principle as *Kent v. Lincoln*, 32 Vt. 591, and to cases under the statute of frauds, requiring certain contracts to be in writing.

Judgment is affirmed.

BIGELOW & HOAGLAND v. CHARLES W. STILPHEN AND GEORGE W. STILPHEN.

Practice. Pleading. Alteration of a Promissory Note. Principal and Agent.

Under a rule of court that in actions on a written instrument the plaintiff shall not be required to prove its execution by the defendant, unless the latter shall have filed a notice that he shall deny such execution, *held*, that the omission to file such a notice did not bar the defendant from proving that after he had executed the instrument it had been altered in a material respect.

It seems that the alteration of a note in a material respect by the holder after its delivery, without the consent of the maker, will defeat a recovery not only upon the note itself, but also for the consideration for which it was given.

The material alteration of a written instrument by a stranger does not invalidate it, or prevent a recovery upon it as it originally stood.

On who is simply an agent to sell goods and receive the notes of the purchasers for the price, and transmit them to his principal, is not the agent of his principal to alter a note after he has received it, and, in the absence of any evidence that the principal consented to such alteration, or was aware of it before bringing an action upon the note, he may still recover upon it as it stood before the alteration.

ASSUMPSIT upon a joint and several promissory note, dated January 27th, 1860, for two hundred dollars, signed by the defendants, and payable in six months after date at No. 40, Courtland street, New York, with interest. The declaration also contained the usual general counts in assumpsit.

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The defendants pleaded the general issue, and the cause was tried by jury at the April term, 1861, POLAND, Ch. J., presiding.

The plaintiffs produced the note declared on, and the defendants admitted the signatures thereto to be theirs. The defendants then gave evidence tending to prove the following facts: The plaintiffs were shoe dealers, residing and doing business at No. 40, Courtland street, New York City. About the date of the note in suit, one James D. Cook, an agent or clerk of the plaintiffs, came to Swanton, where the defendants resided, and there made a trade with the defendant, C. W. Stilphen, to sell to him a bill of boots and shoes, amounting to two hundred dollars, for which C. W. Stilphen was to give a note either at four or six months, and was to procure either his father or his brother, the defendant, George W. Stilphen, to sign as surety for him. The note in question was written by Cook, and delivered to C. W. Stilphen to procure his father or brother to sign according to the agreement, and he did procure George W. Stilphen to sign it as surety, and delivered the same to Cook as the agent of the plaintiffs.

When this note was signed by the defendants and delivered to Cook, it did not contain the words "jointly and severally," nor the words "with interest," which, at the time of the trial, appeared interlined in the note, but those words had been written therein since the note was executed by them and delivered to Cook, without any assent or authority from the defendants or either of them, that such alterations might be made. It was proved that these interlineations were in the hand writing of Cook, but there was no evidence as to the time when they were made, nor was there any evidence as to how long Cook continued in the plaintiffs' service after the note was given, or whether he had ever left their service, nor was there any evidence except as above stated, that the plaintiffs knew that the note had been altered since it was given, or that they approved or directed any such alteration.

It was not claimed by the defendants that the bill of boots and shoes had been paid except by giving this note. The plaintiffs seasonably objected to all this evidence given by the defendants on the ground that no plea and notice had been filed accord-

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ing to the 22d rule of the Franklin County court, which is as follows :

" In actions founded on any instrument in writing, purporting to have been signed by the defendant, the plaintiff shall not on trial of the case be required to prove the execution of the instrument, unless the defendant shall have filed the general issue within the time limited for filing special pleas, and have appended thereto a notice, that he shall on trial deny the execution of such instrument ; and in all cases where the execution of a written contract is put in issue by the pleadings, if the hand writing is to be disputed, it shall be so noted in the margin of the next subsequent pleading when the same is filed."

The court overruled the objection and admitted the evidence, to which the plaintiffs excepted. The defendants had filed no written plea.

After this evidence had been given, the plaintiffs introduced no evidence in opposition thereto, and made no question, but that all the facts were sufficiently proved, which the testimony tended to establish.

The plaintiffs claimed that they were entitled to recover of both defendants upon the note, but if they could not so recover for the reason that the note had been unlawfully altered, then they claimed that they were entitled to recover of C. W. Stilphen for the bill of boots and shoes, which formed the consideration of the note, under the general counts in their declaration.

But the court refused to so instruct the jury, but ruled that upon these facts the plaintiffs could recover of neither defendant, and directed a verdict for the defendants, which was accordingly rendered. To this ruling and direction to the jury the plaintiffs also excepted.

H. A. Burt, for the plaintiffs.

H. S. Royce, for the defendants.

PIERPOINT, J. It is insisted that the county court erred in admitting evidence of the alteration of the note in controversy, as the defendant did not give notice, that upon the trial he should

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deny the execution of the note, according to the requirements of the rule of the county court, when such is the intention.

Without undertaking to decide whether the admission of evidence by the county court in violation of its own rules of practice, is such an error as can be revised by this court upon exceptions, we are all clearly of the opinion, that in the admission of the evidence offered, there was no violation of the rule. Rules like the one under consideration have been adopted in most of the counties in this state, and the universal construction that has been put upon them in practice, is, that they apply only in cases of a denial of the genuineness of the signature of the party to the instrument declared upon; if the defendant intends to do that he must plead and give the notice required by the rule, but without doing so he is at liberty to deny any other fact tending to establish his liability, or to prove any other fact necessary to his defence. The omission to plead and give notice operates under the rule as an admission, for the purposes of the trial, that the signature to the instrument declared upon is his hand writing, but it is not an admission that the instrument when offered is as it was when he signed his name, or even that there was any instrument whatever written above the signature when he wrote it. By admitting the signature he takes upon himself the burden of proving that he is not bound by the instrument; as a general rule the presumption is against him. There was no error in this respect.

Did the county court err in directing a verdict for the defendants?

The case shows that no question was made but what all the facts were sufficiently established, that the evidence tended to prove.

The note was altered in a material respect after it was signed and delivered to Cook by the defendants, and without their knowledge, authority or assent. The alteration was made by Cook, and in his hand writing. There was no evidence that the plaintiffs directed or approved of it, or had any knowledge of it until the trial, or that Cook had any opportunity to alter it after he delivered it to the plaintiffs. We must assume then, that the note was altered by Cook before it was delivered to the plaintiffs, and without their knowledge.

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It was decided in England at an early day, *Pigot's case*, 11 Coke 27, that the alteration of a deed in a material point by a party to it, or by a stranger, rendered the deed void. This rule was soon after modified so far as that a deed altered by accident or mistake, or lost or destroyed, would still be good according to its original terms, (15 East 17 ; 3 Barn & Cres. 428 ; Chitty on Con. 609,) and such is now universally recognized to be the law. In *Master v. Miller*, 4 Term 320, it was held that the rule was the same in the case of the alteration of notes, bills of exchange, or other written instruments. And the rule seems now to be well settled that if the holder or owner of a note or other written obligation alters the same in a material point without the knowledge and consent of the signer, such note or other obligation is thereby rendered void. 4 Term 320 ; 3 B. & Adol. 660 ; 5 Term 367 ; Chitty on Contracts 607 ; 1 New Hamp. 95.

Whether such alteration works a forfeiture of the debt so that there can be no recovery by the party making such alteration for the original consideration for which the obligation was given, in any form of action, is a question on which the authorities are not entirely harmonious. The weight of authority, however, seems to be in favor of the position, that in such case there can be no recovery for the original consideration. The forfeiture of the debt is one of the penalties that the law imposes upon the party who alters or tampers with the written evidence which he holds of his claim. The rule is based on considerations of policy, the object being to deter the holders of written instruments from attempting to commit frauds upon the signers, by altering them. It was said by Lord Kenyon in *Master v. Miller*, that no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected.

But that part of the rule laid down in *Pigot's case*, that declares that an alteration by a stranger without the knowledge or assent of the party, shall avoid the instrument, seems to have found but little favor with the courts in modern times. Indeed, it seems to be difficult to find a sufficient reason for the rule, founded either in justice or sound policy. Clearly, it is not just that a

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man should be deprived of an honest debt, or have the evidence of it destroyed for all beneficial purposes, in consequence of the misconduct of a stranger, to whose act he did not assent, and of which he had no knowledge. It is not the fact, that an instrument is altered, that makes it void; if it was, an alteration by accident or mistake would have that effect. It is the intent, that gives the act its character and avoids the instrument, and it is difficult to understand why a man who has done no wrong, nor consented that any should be done, should be punished to the extent of the amount of his demand by having his claim cancelled by operation of law, solely because another has been guilty of an act for which he ought to be punished.

Public policy does not require any such rule. Declaring the instrument void in case of alteration, has no tendency to deter a stranger from making such alteration. Punishment inflicted upon the innocent, has no terror for the guilty, and if such a rule was established, it would by no means follow that when an alteration was made by a stranger, it would be made for the benefit of the holder. The sole object in making the alteration might be to render the instrument void. It might be from motives of friendship to the maker, or enmity to the holder, or from selfishness on the part of the stranger, he expecting thereby to add to the security, or increase the probability of collecting a debt of his own against the maker. These considerations are quite as likely to lead to an alteration, as a desire to benefit the holder, and the probabilities of success are much greater.

Modern authorities seem to be against the rule. In *Hensfree v. Bromley*, 6 East 310, it was held that if an umpire alter an award in a material part, after the expiration of his power, the award is not thereby rendered void, but is good as originally made.

In *Jackson v. Malin*, 15 Johns. 293, PLATT, J., says "that a material alteration, though made by a stranger, without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent."

In *Rees v. Overbaugh*, 6 Cowen 746, it was decided, that if a stranger tear a seal from a deed, it shall not destroy it.

In *Nichols v. Johnson*, 5 Comst. 192, it was held that an alteration of a written instrument by a stranger, though material,

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will not render such instrument inoperative. CHURCH, J., in delivering the opinion of the court, says : " It can hardly be conceived, if a deed or other instrument in writing is not rendered inoperative, by either a mistaken alteration or its loss, or even entire destruction, how it can be, by an unauthorized intermeddling of a stranger."

We think the rule, as indicated by reason and authority, is, that an alteration of a written instrument by a stranger without authority does not render such instrument void.

In applying these principles to the case under consideration, it is clear that the plaintiffs cannot recover on the first count, as the defendants never executed any such note as is therein declared upon. There is no count describing the note as it was originally made. The common counts, however, are sufficient to enable the plaintiffs to recover upon the note, as it was executed, provided the alteration made therein by Cook did not render it inoperative, and that depends upon the relation sustained by Cook to the parties and the transaction. Was he a stranger within the meaning of the term as used in cases of this kind?

Cook was the agent of the plaintiffs to sell the property for which the note in question was given, and also their agent to take the note and transmit or deliver it to them. Beyond this, it does not appear that he had any authority in the matter, or was their agent to do anything further in the business. Clearly he was not their agent to alter this note. Such an act was not within the scope of his authority, and the act was not done in the legitimate discharge of any duty required of him by his agency. Nothing appears by which he could have justified the act as between himself and the plaintiffs, and nothing that ought to make the plaintiffs in any respect responsible for the act ; no more so than if, after having delivered the property sold to the defendants, he had then broken into their store and stolen a part of it. No principle is better settled than that the principal or master is in no respect responsible, when the agent or servant goes out of the line of his agency or employment and voluntarily commits a trespass or does any other act to the injury of another.

Neither can it be said that the plaintiffs have in any sense ratified the act of Cook in making the alteration, by bringing

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this suit to enforce the note as altered, as it does not appear that they had any knowledge of the alteration until it was disclosed upon trial.

We think the act of Cook in altering the note must be regarded in law as the act of a stranger, and that the note is not thereby rendered void, but remains a good and valid instrument as originally drawn and executed. We come to this conclusion the more readily from the fact, that entire justice to all the parties results therefrom. The defendants are required to pay only that which they agreed and ought to pay, and the plaintiffs recover only that which is honestly their due.

Judgment reversed and case remanded.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON,
AT THE
JANUARY TERM, 1863.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. LOYAL C. KELLOGG, } **ASSISTANT JUDGES.**

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LEONARD ATWOOD v. WALTER ROBBINS.

Conclusiveness of Judgments. Evidence.

In an action for a trespass on the plaintiff's land committed in 1859, the defendant pleaded a right of way over the land, and gave evidence tending to support such right. The court ruled after the arguments were closed, that the evidence did not support the plea, because the right pleaded was more general than that attempted to be proved. The defendant thereupon obtained leave to amend his plea, on condition of the payment of costs, and the cause was continued under a rule that, if the costs were not paid within thirty days, judgment should be rendered for the plaintiff for nominal damages and costs. The costs were not paid nor the amendment made, and judgment was accordingly entered for the plaintiff. In another action between the same parties for a similar trespass in the same place, committed in 1860, in which the defendant pleaded and sought to prove the same right of way; *Held*, that the former judgment was conclusive against the defendant's claim, and that the identity of the matters in dispute in the two cases might be shown by parol evidence.

TRESPASS quare clausum fregit. The defendant pleaded the general issue, with notice that the defendant's son owned a right of way over the plaintiff's close to and from certain land belonging to the defendant's son, for the purpose of entering thereon to cut hay and to carry off the same, and that the defendant committed the alleged trespass in the legal and proper use of such right of way in the employment and business of his son in connection with such land. The cause was tried by jury at the December Term, 1861, *PIERPOINT, J.*, presiding.

The plaintiff gave evidence tending to show title in himself to the premises in question, and that the defendant in the summer of 1860 crossed over the plaintiff's close with teams, and drew hay over the same.

The defendant relied on the right of way set up in his notice of special matter in defence, and introduced evidence to show that such right existed.

The plaintiff introduced, against the objection of the defendant, the files, record and docket entries of a suit in his favor against the defendant in the Addison County Court, in which final judgment was recovered at the June Term, 1860, of that court, and proved in connection therewith that the trespasses sued for in that action and proved on the trial thereof, were for enter-

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ing by the defendant of the same close of the plaintiff now in question, in 1859, and crossing it with teams by the same route as shown in the present case, for the purpose of cutting and getting hay on the same land of the defendant's son referred to in the present case; that the defendant under his special notice in that case gave evidence tending to establish the same right of way now claimed by him in the route, and as appurtenant to the same land, and for the same purpose, that of getting off hay; and that the existence of such right, as acquired by user, was the sole question litigated in that case; that after the evidence was closed and the case had been argued to the jury, the court ruled that the evidence did not support the plea, inasmuch as the right set up was more general than the right attempted to be proved; that thereupon the counsel for the defendant moved for leave to amend the plea, which motion was granted on payment of costs, and the case was continued under a rule that if the costs were not paid within thirty days, judgment should be entered up as of that term for the plaintiff for nominal damages and costs; that the costs were not paid nor the amendment made, and that judgment for the plaintiff was entered up accordingly as of the June term, 1860, and execution was issued thereon.

The plaintiff, among other things not material to be reported, requested the court to instruct the jury that the judgment between the same parties in the former suit, in regard to the same right of way, was conclusive against the defendant, and that therefore the verdict should be for the plaintiff.

The court declined so to instruct the jury, but charged them that the former judgment and the evidence relating to it was not to be considered by them. To this decision, as well as to other points in the charge not material to be reported, the plaintiff excepted.

E. N. Briggs and E. J. Phelps, for the plaintiff.

J. W. Stewart and Daniel Roberts, for the defendant.

POLAND, CH. J. We are all agreed that the record of the former recovery by the plaintiff against the defendant, and the

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facts proved in connection with it, ought to have been held conclusive upon the defendant, as to the right of way set up by him to the present action.

We do not regard the former judgment as binding or conclusive upon the evidence that had been introduced by the respective parties, but only as a judgment by the confession or consent of the defendant, and as if rendered by default, or *nil dicit*. The fact that the parties had actually gone on to a trial, and introduced all their proofs, we regard as important only in this view, that it now enables the plaintiff in this action to show conclusively precisely what his claim was in the former action, and also the ground upon which the defendant in the former action asserted a right to do the act for which he was then sued. Had no evidence been introduced on the former trial, and the plaintiff had obtained a judgment by default in the ordinary way, that might have been difficult, but as the whole subject of the respective claims of the parties was shown in court, the proof of identity is made clear of any doubt.

Had the former trial proceeded to a verdict or judgment in favor of the plaintiff upon the evidence given, it is not denied that such verdict or judgment would have concluded the defendant in any subsequent action where the same right of way was again brought in question.

And if the defendant saw fit to submit to a judgment against himself, without trial, we see no ground to doubt that such judgment is equally conclusive upon him.

The evidence introduced in connection with the record of the former judgment proved, that that suit was brought to recover damages against the defendant for an act of the same character as that for which the present suit is prosecuted, and that it was done by the defendant and claimed to be justified by the same right of way under which the defendant attempts to justify his act in the present action.

If the case, therefore, had been determined by a judgment or verdict founded upon the proofs of the parties, it would have been a decision of the precise point in controversy in this action.

But by submitting to a judgment, without trial, the defen-

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dant confessed the same thing, that he committed the trespass alleged, and that he had not at the time any lawful justification for it.

The production of the record alone would not be sufficient to show a defence to this action. It might be that the act of trespass alleged in this suit was upon a different portion of the close from that complained of in the former suit. The defendant might not have had any legal justification for the act of trespass in the first suit, but might have acquired one before this last was committed. In short, the record alone did not show that the two acts were identical, either in the place where they were committed, or that both were done in the assertion of the same right of way claimed by the defendant.

But all this was unquestionably shown by the evidence on the trial; the identity of the place, and character of the act, and the assertion of the same right by the defendant in both cases.

If such evidence was admissible to show the real subject matter upon which the plaintiff obtained the former judgment, there would seem but little reason to doubt its final and conclusive effect.

The ancient doctrine of the law seems to have been that a former judgment was conclusive only upon questions that appeared by the record to have been in issue directly, or necessarily included in the finding upon the issue that was formed, and upon which the judgment was rendered. But it seems now fully settled in this country, that where, by reason of the general form of the declaration, or other pleadings, it does not appear from the record what the precise subject matter of the suit or the precise point litigated was, parol evidence is always admitted to show it, and that when thus shown clearly, the judgment is equally as conclusive as if the record itself showed the same fact.

This evidence of identity may raise a question of fact, upon which the case may go to the jury, but, when established, the former decision becomes conclusive in a subsequent action when the same matter is again brought in question.

We have no occasion to go over the decisions on this subject, as the cases in this state have gone as far as those of any state in allowing the introduction of parol evidence to explain the

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former judgment, and its conclusiveness when shown. We would refer to *Isaacs v. Clark*, 12 Vt. 692; *Gray v. Pingry*, 17 Vt. 419; *Perkins v. Walker*, 19 Vt. 144.

If the defendant relied on what he now says might have been true, that the last act of trespass was in a different place from the former, or that he had acquired a right to do the latter, which he had not to do the former, he should have encountered the plaintiff's proof to show the identity of the acts as to place and character, and of the right under which he claimed to act.

The slight differences between the declarations and special notices in the two actions, we do not regard as at all important in the decision of this question.

It seems to us to stand upon this plain ground: The defendant claimed a right of way over the plaintiff's close, and travelled there with his teams. The plaintiff, to test this right, brought an action for crossing his close, and the defendant allowed judgment to be taken against him. Afterward, in the assertion of the same right, the defendant again crossed the plaintiff's close in the same manner as before. Can he by consenting to a judgment against himself, retain a right to litigate the same question as to his right to cross the plaintiff's land? We think not, any more than if his right had been litigated and decided against him.

We do not decide the other questions, as the decision of this question is apparently decisive of this case.

Judgment reversed and case remanded.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF RUTLAND,

AT THE

FEBRUARY TERM, 1868.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

**HON. ASA O. ALDIS,
HON. JOHN PIERPOINT,
HON. ASAHIEL PECK,**

} ASSISTANT JUDGES.

R. & B. R. Co. v. Thrall.

THE RUTLAND AND BURLINGTON RAILROAD COMPANY v. REUBEN R. THRALL.

Corporation. Directors. Pleading. Railroads. Charter. Evidence. Exceptions. Supreme Court. Forfeiture of Stock for non-payment of Assessments.

The plaintiff's charter required that ten thousand shares of stock should be subscribed before any assessments should be made. That number of shares was subscribed for, but the subscription contained a condition that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad should be put in operation. *Held*, that this condition was not a violation of the above-mentioned requirement of the charter.

The plaintiffs' charter provided that the directors might require payment of the sums subscribed to the capital stock, at such times, and in such proportions, as they should deem best. The subscription provided that the directors might, after the requisite number of shares was subscribed for, proceed to make assessments thereon for the purposes authorized by the charter, but that no assessment should exceed ten dollars on a share. The directors passed a vote that sixteen assessments of five dollars each be laid on the capital stock, to be called for by the treasurer at such times as the executive committee should direct. This executive committee was composed of four directors appointed by the board. In an action to recover these assessments upon the defendant's subscription, the declaration set forth the laying of these assessments, and alleged that the executive committee called for their payment at certain specified times. *Held*, that neither the charter nor the subscription prevented the directors from laying several assessments, not exceeding ten dollars each, by one vote; that the ratification by the directors of the acts of the executive committee in fixing the time for the payment of, and calling for, the several assessments so voted, made such acts the acts of the directors within the provisions of the charter and subscription.

Held, also, that the declaration should allege that the time of payment of the assessments was fixed by the directors, and the call therefor issued by them, instead of by the executive committee.

After the defendant's subscription and the organization of the corporation, the legislature authorized them to extend their railroad beyond its original prescribed limits, and the corporation accepted such addition to their charter without the defendant's consent. But another stockholder resisted the projected extension of the road, and the court of chancery enjoined the plaintiffs from proceeding under the new act, and they thereupon abandoned all action thereunder. *Held*, that this furnished no ground of defence to the defendant against his stock subscription.

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The legislature also, after the plaintiffs' organization, authorized them to issue preferred stock at a guaranteed rate of interest, which addition to their charter was accepted without the defendant's consent, and the preferred stock issued accordingly. *Held*, that this was a legitimate mode of raising money, and did not release the defendant from liability on his stock subscription.

The plaintiffs' charter required that the directors should give notice of the assessments on the capital stock, and the time and place of payment thereof, in certain newspapers. *Held*, in the absence of any proof of a fair and diligent search for, and inability to find, such newspapers, in places where they would be likely to be, within the vicinity of the party, and reasonably accessible, that the testimony of a witness who stated that he had examined such newspapers, and that the notice was published therein as required by the charter, and also stated the contents of the notice, was incompetent.

It seems, that where proof of the successive publication of a notice in a newspaper is required, it is sufficient to produce one paper and show the contents, and then prove by parol that there were the requisite successive publications of the same notice. *ALDIS, J.*

The defendant, by his subscription to the plaintiffs' capital stock, promised to pay the several assessments thereon as they should from time to time be ordered, according to the act of incorporation. The act of incorporation provided that the directors should give notice of the several assessments, and of the time and place of their payment, in certain newspapers. *Held*, that it was a condition of the defendant's liability that such notice should be given as required by the charter, but that such condition might be waived by the defendant.

Held that, in this case, no such waiver was proved.

When an exception appears in terms to have been taken in the county court, it is to be regarded as rightly before the supreme court, unless other parts of the bill of exceptions show to the reasonable satisfaction of the court, that it was not passed upon by the county court.

Before the passage of any statute relating to forfeiture of stock in a railroad company by reason of non-payment of assessments, and when the only legislative provision in reference to the matter in question was contained in the plaintiffs' charter, in the following words: "the directors may require payment of the sums subscribed to the capital stock at such times, and in such proportions, and on such conditions, as they shall deem best, *under the penalty of forfeiture of all previous payments thereon.*" *Held*, that the proceeding by forfeiture was cumulative, and coexisted with the right to sue for the assessments; that in declaring a forfeiture of stock the plaintiffs must adopt a course of proceeding reasonable and just to the stockholder; that it was not necessary that the notice of the conditions on which the

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stock would be forfeited, should be issued when the calls for the assessments were made; that a declaration of forfeiture, made August 15th, of all stock on which assessments should remain unpaid September 20th following, and requiring immediate notice of such declaration to be given to all delinquents, was reasonable; that under such a declaration a sale of the stock was not necessary to complete the forfeiture; that a stockholder whose stock had been thus forfeited, was thereby released from any further liability upon his subscription; and that the forfeiture would not take place unless the corporation gave reasonable notice to the delinquent stockholder that his stock would be forfeited unless by a specified time the overdue assessments were paid.

ASSUMPSIT to recover certain unpaid assessments upon the defendant's subscription for twenty shares of the capital stock of the plaintiff's corporation, then known by the name of the Champlain and Connecticut River Railroad Company. Plea, the general issue, and trial by jury, at the September Term, 1860, PIERPOINT, J., presiding.

The plaintiffs proved their incorporation and organization, and also the subscription of the defendant for twenty shares of the capital stock, as set forth in the declaration. By this subscription the defendant and the other signers severally agreed to take the number of shares affixed to their names, and to pay the several assessments thereon as they should from time to time be ordered, according to the act of incorporation, upon four conditions therein recited, the only ones of which, material to be reported, are the second and fourth, which were respectively as follows:

Second, That as soon as ten thousand shares shall have been subscribed, the directors may proceed to make assessments on the shares subscribed, for the purposes authorized by the charter; but no more than fifty dollars on a share shall be assessed and made payable within one year from the time when the first assessment shall be laid or ordered; and no assessment shall exceed ten dollars on a share.

✓ *Fourth*, That interest shall be allowed and paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad shall be put in operation; and any and every subscriber shall have the privilege of paying in, at any time during one year from the time when the first assessment

shall be made payable, fifty dollars on each share by him subscribed, and at any time during the second year thereafter the remainder thereof; and shall in such case receive interest thereon from the time of payment until the railroad shall be put in operation; and said payments shall be received in discharge of assessments to the amount thereof.

The plaintiffs gave evidence tending to prove that ten thousand shares of stock were subscribed for before any assessments were made thereon.

The plaintiffs put in evidence their corporation records, showing the votes of the directors, laying the various assessments sued for. One of these votes was passed June 4th, 1847, as follows :

Resolved, That sixteen assessments of five dollars each be laid on the shares of the capital stock of this corporation, to be called for by the treasurer at such times as the executive committee shall direct.

The plaintiffs also proved that the directors on the 13th January, 1847, appointed four of their number an "executive committee," and that such committee, under the authority of the above vote of the directors of June 4th, 1847, from time to time directed the treasurer of the corporation to call for the several assessments upon the stock, contemplated by such vote. These directions to the treasurer were in writing, signed by the several members of the executive committee, or a majority of them, and directed him to duly advertise for such assessment respectively, naming in such direction the times when such assessments were to be paid, but no place of payment was mentioned.

The only provision of the plaintiffs' charter material to be reported here, was the 17th section, which was as follows :

"The directors may require payment of the sums subscribed to the capital stock, at such times, and in such proportions, and on such conditions, as they shall deem best, under the penalty of forfeiture of all previous payments thereon; and shall give notice of the payments required, the time and place where the same is to be paid, at least thirty days previous thereto, in a newspaper published in each of the counties through which such road passes."

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The plaintiffs introduced the deposition of Samuel Swift, who was the plaintiffs' treasurer during the whole time that the several assessments sought to be recovered were laid, the purpose of which was, among other things, to prove that notice of these various assessments was given in accordance with the 17th section of the plaintiffs' charter.

In respect to this point the deponent stated that he had examined certain newspapers printed in each of the several counties through which the plaintiffs' railroad passed, and that he knew that the notices of the assessments in question were published in them as required by the charter. The deponent then stated the contents of the notices, but did not annex to his deposition the newspapers which contained them, nor were they produced on trial. The statement of the contents of these notices, as given by the deponent, did not show that they specified any *place* of payment of the assessments. To the admission of this deposition the defendant objected, but the court overruled the objection, and admitted the deposition, to which the defendant excepted.

The plaintiffs called Charles Linsley as a witness, who testified that he was appointed by the directors a committee to collect the subscriptions; that he called on the defendant for that purpose, and that he said he would pay as soon as he could; but the witness could not fix the time when he so applied to the defendant, and could not say whether it was before or after this suit was commenced.

✓ It was also proved that the construction of the plaintiffs' railroad was commenced in the winter of 1846-7, and that the road ✓ was opened December 18th, 1849; and that interest had been allowed and paid back to the stockholders agreeably to the fourth condition of the plaintiffs' subscription.

The defendant offered to prove that the plaintiffs, without his consent, applied to the legislature and procured the passage of an act, being No. 98 of the acts of 1850, authorizing the extension of the railroad from Burlington, its original northern terminus, to Swanton, and by vote of February 6th, 1851, accepted the same, and expended their money and the labor of their servants in obtaining such extension of their charter, and in surveying the extension of their road under said act; but it being

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admitted that any further expenditure of their funds in the prosecution of such extension was stayed by an injunction from chancery, on the petition of a stockholder, and that such injunction now stands, and said writ is now pending, and that nothing has since been done under said act, the court rejected the evidence offered, and to such rejection the defendant excepted.

The defendant also offered a vote in stockholders' meeting of February 6, 1851, accepting as part of the plaintiffs' charter, an act approved November 9th, 1850, authorizing the issue of stock, guaranteeing a certain dividend, and offered to prove that said corporation had thereunder issued certain six per cent. and certain eight per cent. preferred stock, which was preferred in behalf of the subscribers thereto to all other stock of said corporation in the declaring and payment of dividends; and that certain dividends had been declared and paid upon such preferred stock, to the subscribers thereto, and none to the original subscribers; all without his consent. The court excluded this evidence, and the defendant excepted.

The defendant also offered in evidence three resolutions passed August 15th, 1849, relative to the forfeiture of stock, with evidence that such stock was then worth \$60 per share in market; but it was not claimed that the defendants' stock had ever been sold by the corporation. Excluded. To this exclusion the defendant excepted. These resolutions were as follows:

"Whereas, sundry persons in whose name the stock of this corporation stands, are delinquent in the payment of assessments ordered thereon; and whereas, at the meeting of stockholders on the 20th day of June last, the following resolution was adopted, viz:

"Resolved, That the directors be, and they are hereby, requested to take prompt and efficient measures for the collection of unpaid assessments upon the capital stock of this corporation, and so far as they think expedient, to sell all such shares as are not paid before the 1st of August next."

Now be it

Resolved, That all stock on which the assessments shall remain unpaid on the 20th day of September next, shall be, and hereby is, forfeited to the use of this corporation.

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Resolved, That the treasurer be, and he hereby is, directed to issue a circular giving immediate notice of the above vote to all delinquent stockholders, and that all stock forfeited to the corporation, by virtue of the foregoing resolutions, be brought to a public sale under the direction of the treasurer, and sold on account of the delinquent stockholders, at such times and places as he shall think expedient; and for any deficiency that may remain unpaid on assessments after such sale, the treasurer is hereby directed to enforce the collection by a suit at law.

Resolved, That the minimum price of the stock be fixed at seventy cents, and that if sold by the treasurer for non-payment of assessments under seventy cents, it shall be bought in for the corporation."

The evidence being closed, the defendant asked the court to instruct the jury that upon the evidence the plaintiff was not entitled to recover; that there was no evidence of notice having been given of the time and place of payment of assessments, as required by the charter. But the court refused so to charge, and submitted the case to the jury, with instructions in relation to the vote of June 4th, 1847, and the action of the executive committee thereunder, that it was competent for the directors then to lay assessments to the full amount of the balance of the subscriptions, and leave the time of payment to be fixed by the executive committee; and that if the said committee did fix the time of payments at the times that the plaintiffs' evidence tended to show, it was the same thing in effect, if so done, as if the directors had fixed the time themselves, and the assessments would not be invalid. The court further instructed the jury that if they did not find that ten thousand shares of the plaintiffs' stock was subscribed for before the making of the assessments, their verdict should be for the defendant.

✓ The jury returned a verdict for the plaintiff, for the full amount of the defendant's subscription, and interest from December 18th, 1849, deducting the admitted payments, it being conceded that the 18th of December, 1849, was the proper time from which to cast interest.

After verdict the defendant moved in arrest of judgment for the insufficiency of the declaration. The only part of the dec-

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laration material to be noticed in reference to this motion in arrest is that in which it was alleged, after stating the vote of the directors on the 4th of June, 1847, laying sixteen assessments of five dollars each, to be called for by the treasurer at such times as the executive committee should direct, that "the said executive committee, being members of the said board of directors, did direct, and said treasurer did call for, the payment of said sixteen assessments for the use of said company as follows, to wit," specifying the several times of payment fixed by the executive committee.

The county court, *pro forma*, overruled this motion in arrest, to which the defendant excepted.

Daniel Roberts, for the defendant.

S. H. Hodges and *E. J. Phelps*, for the plaintiffs.

ALDIS, J. I. The first point made by the defendant is that the subscription is void on account of the fourth condition contained in it, which provides that "interest shall be allowed and paid by the company on all sums assessed and paid, from the time of payment until the railroad shall be put in operation." It is claimed that this condition is in substance an agreement by the company to pay back to the subscribers a part of the capital stock required by the charter, and therefore that the amount required in order to organize the company was not in fact subscribed; that the charter requires a million of dollars, and that by this arrangement the amount subscribed was only a million, minus the interest to be paid back. We deem this point untenable. ✓

I. No time is fixed for the payment of the interest. Upon a similar proviso in *Waterman v. Troy and Greenfield Railroad*, 20 Law R. 351, cited in *Redfield on Railways*, p. 100, it was held that the agreement did not bind the company to pay interest before the road went into operation. The whole amount subscribed might be expended in constructing the road, and the interest be paid out of the earnings, after it went into operation. Upon a capital of a million thus invested, the company might

borrow money to pay this interest before the road went into operation, charging the future earnings with the payment of the debt.

The condition is just as among the subscribers—those who pay early not losing their interest, and those who pay late not gaining the use of their money by withholding it.

Its practical operation would be beneficial to the company by securing the prompt payment of assessments. We think the condition has been very generally adopted in subscriptions to railways, and that it has never been deemed a reduction of the stock below the amount subscribed.

The cases cited from 6 Cush. and 18 Barb. are not in point. They only go to the general principle that a subscription to be paid in property of less value than the amount subscribed is not a subscription in money to the amount subscribed. Here the whole amount subscribed is actually paid in money. See 12 Barb. 156.

II. It is claimed that the assessments as made by the executive committee of the directors, and addressed to the clerk or treasurer, do not specify a *place* of payment. The 17th section of the company's charter does not require it. It provides only that the directors "shall give notice of the payments required, the time and place where the same is to be paid, at least thirty days previous thereto, in a newspaper published in each of the counties through which the road passes." See 2 Vt. 293, as to notice of a demand of payment.

III. That the assessments were not legally made, because by vote of June 4th, 1847, sixteen assessments of five dollars each were laid by the directors; when in fact only one at a time could be included in the vote. There is no such limitation in the charter. It should be left to the judgment of the directors. 40 Maine 172 is for this view, and the better rule. The case in 22 Com. Law 130, *Stratford &c. R. R. v. Stratton*, has not been followed in England.

The rule in England now is that a call by instalments is valid. 4 Eng. Law and Eq. 459 and 461. Redfield on Railways, section 52.

IV. It is further objected that the act of November 13th, 1850,

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and its acceptance by the plaintiffs, was a fundamental alteration of the charter. If not assented to by the defendant, and if carried into operation, it would have released the defendant from his subscription. But it appears that the projected alteration was resisted by a stockholder,—that the court of chancery enjoined the plaintiffs from proceeding under the act, and that the act of incorporation and action under it have been in effect abandoned by the plaintiffs. These facts show that the defendant has not been injured by the act which passed the legislature, and that the original enterprise of the plaintiffs, for which he subscribed, remains unaltered.

5. It is also objected that the act of November 9th, 1850, authorized the railroad company to issue 5000 shares of their stock, and to guarantee a payment of an eight per cent dividend upon it. The nature of the guaranty does not appear, nor is it shown that the raising of money by this proceeding was not necessary and useful, and for purposes contemplated in the charter. The right to issue the shares existed before the act of 1850, as the stock of the company, by section 3 of the charter, could be increased to an amount needful to complete and carry on the road. It is therefore the giving of the guaranty that works injustice (if any) to the defendant. Substantially, this seems to us nothing more than a mode of raising money by pledging in some form the capital already obtained for the new amount required. ✓

Now there is nothing in the terms of the charter, or the subscription, that forbids the pledging or mortgaging of the capital invested to secure further loans. In this form it certainly makes two classes of stockholders—one whose capital is invested without any security for profits or interest upon their money, except what the prospective success of the enterprise may afford;—the other, to whom a profit, usually higher than simple interest on their money, is guaranteed upon the amount subscribed.

Notwithstanding the evils growing out of having two classes of stockholders, with conflicting interests, we believe it has been a mode of raising money much used in this kind of enterprise, and regarded only as in the nature of a mortgage. This form of security practically, perhaps, does not make the conflict of inter-

ests of the different holders of securities any greater, or depreciate to any greater extent the value of the original stock, than if in the form of a loan by bond and mortgage, for those who purchase bonds secured by mortgage may also be stockholders, and thus have the same motives for managing the company for their own interests as if their debt was in the form of preferred stock.

The issue of preferred stock seems to be treated as a legitimate mode of borrowing money, and as only a form of mortgage. Ch. J. REDFIELD so regards it in his treatise on railways, p. 593.

Whether such holders of preferred stock would have any greater rights than mere mortgagees—any right as *stockholders* to act in meetings of the company, and to control and manage its affairs, is a question we are not now called upon to consider.

As to the admission of Judge Swift's deposition. It was admitted to prove, among other things, that the notices of the assessments were published in the newspapers, as required by the charter, and that the contents of these notices were such as the statute required. He states that he had examined the newspapers, and that they contained the notices, and then states the contents of the notices, but does not annex or produce the newspapers which contained them.

Were the contents of these notices, as published, material? On this point we think there can be no doubt. The charter provides that the directors, after making their assessments upon the subscribers, shall give notice thereof by publishing them, and the times and places when and where payable, in a newspaper at least thirty days previous to the time they are made payable. The subscriber, by incorporating this into his subscription, secures this notice as a condition precedent—without compliance with which he is not liable to suit. Hence proof of a publication containing notice of those facts is indispensable to maintain the suit. The newspaper which contains the notice is clearly the best evidence of its publication and contents,—the very evidence which the law and the contract provided as the proper proof to the subscriber of the calls. Its production in the first instance is required by the ordinary principles of the law of evidence.

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There are many cases where notices given during the progress of a cause—notice to produce papers, and notices to quit, have been allowed to be proved by copies, and in some instances by parole evidence, without proof of notice to produce the originals. But these stand upon different grounds from notices essential to the cause of action, and upon whose contents the rights of parties depend. These, containing matters vital to the cause of action, should be proved by the best evidence; and for the same reasons that all material facts must be so proved.

It is said that the difficulty of producing and examining in court great numbers of newspapers is a sufficient reason for an exception here. But the difficulty does not appear to us to exist. In the case at bar the production of a single newspaper containing the notice for the county where the defendant then resided, would be enough. In cases where successive notices are required, we should incline to think that the production of one paper to show the contents, and proof by parole that there were successive publications of the same notice, would be enough; but here one publication was enough.

It is also objected that there can be no proof of loss of the original without proof of the loss of the whole edition in which the notice appeared—that this is impossible, and so where no paper could be found the party would be deprived of all proof. But the sensible and practical rule of search and inability to find an original does not require any such extreme strictness of proof. It would be sufficient, as in other cases of lost instruments, to show a fair, sincere and diligent search for the newspaper in places where it would be likely to be, within the vicinity of the party, and reasonably accessible. Application to the office of publication, if the paper is still published, or to the county clerk who keeps such files, will generally secure a copy.

The admission of the deposition to prove, in the first instance, and without proof of loss, the contents of the printed notice, we deem error.

It would seem that in Georgia the production of the newspaper has been held necessary in the first instance; *Schley v. Lyon*, 6 Geo. 830, as cited in 10 U. S. Dig. 201.

In Indiana, *Unthank v. Henry County Turnpike Company*, 6

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Porter 125, where a notice for the payment of instalments was required to be published three weeks successively, proof of the publication by producing one copy of the paper, and the deposition of the publisher that the same was published the requisite number of times, was held sufficient. This seems very reasonable, for the contents are proved by the production of the paper, and then proof by others of due publication for the rest of the time, would be sufficient.

We have already said we deem it material that the notice should specify the place of payment. This seems to us very plain upon consideration of the reasons which doubtless led to the insertion of such a provision in the charter.

The subscribers resided in various towns in the state, from Burlington to Bellows Falls. They would naturally be in doubt as to who was the proper officer to receive payments, and where he resided, and at what place they might make payment. They might judge erroneously as to where, by implication of law, they should pay their subscriptions. To remove all uncertainty the charter provided that it should not be left to implication—that the notice should express the place of payment. The provision seems to us too important to be disregarded, or held as merely directory. And when the contract itself includes by reference this provision within its terms, it must be held a substantial part of the contract, and to be construed in the plain and ordinary sense in which common minds would look at it, and that is as a condition, which must be performed before the subscriber can be sued.

The authorities concur with this view. The case of *Essex Bridge Company v. Tuttle*, 2 Vt. 393, shows that actual notice, or notice pursuant to the charter or by-laws, should be given before a suit can be maintained.

It is so recognized in *Redfield on Railways*, p. 74, and in the 22 Conn. 435. Not that it is a condition that can not be waived by the party; on the contrary, he may by his acts treat the assessments as valid, and preclude himself from objecting to them upon such ground. It is claimed that the defendant has so waived this objection by paying the instalments—but it does not appear what instalments were paid, nor whether this defect

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existed in the calls for them. It is also claimed that Mr. Linsley, as agent to collect subscriptions, called on the defendant, and he said he would pay as soon as he could, but he can not fix the time, not even whether before or after suit brought. It may have been before he paid what he has paid, and before the defect existed, or was known to exist. The alleged acts of ratification are quite wanting in those significant and positive elements which are held to estop the party from taking the objection, as will be seen by an examination of the cases in which they have been so regarded; *Danbury and Northern R. R. Co. v. Wilson*, 22 Conn. 454; 13 Met. 311.

It has been urged in argument that this question was not passed upon by the county court, and is presented to this court for the first time. The exceptions say "the defendant asked the court to instruct the jury that there was no evidence of notice having been given of the time and place of payment of assessments." The court refused so to charge, and to the refusal the defendant excepted.

The question is clearly within the plain language of the exceptions. We can readily see how the attention of the court may have been directed to other grounds of objection—to the exclusion of Judge Swift's deposition, rather than to what was proved by it—and thus this point may not have been really prosecuted and decided upon, though included in general terms in the request. But we deem it a fair rule in the construction of bills of exceptions to hold that where an exception appears in terms to have been taken in the county court, we must regard it as rightly before this court, unless other parts of the bill of exceptions show not only that it *may* not have been passed upon by the county court, but also, to the reasonable satisfaction of this court, that it was not. Adopting this rule of construction, we think this point is properly before this court.

As there was no proof that the notices, as published, named any place of payment, and no such acts were shown on the part of the defendant as should estop him from objecting to this suit on this ground, we think the judgment in this respect erroneous.

As to the forfeiture.

The county court excluded this evidence, upon the ground

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that without a sale of the defendant's stock the forfeiture could not operate to divest the defendant of his title to it. This we are clear is the true construction of the exceptions. The question whether notice of the resolutions of August 15th, 1849, was given to the defendant, does not appear to have been raised in the court below ; but upon the defendant's offer, the court say : " but it was not claimed that the defendant's stock had ever been sold by the corporation. Excluded."

1. The decisions which have been made, in this country and in England, upon the point when the forfeiture is perfected, vary according to the various provisions of the general statutes, or of charters regulating the proceedings of forfeiture.

In England, the public statutes, called the Companies Clauses Consolidation Act, 8 and 9 Vict., regulate with great minuteness the proceedings upon the forfeiture of railway shares, and protect with much care the rights of shareholders.

By those statutes the corporation may, after the expiration of two months from the day of payment, declare the shares of the delinquent forfeited, but the declaration does not take effect till it has been confirmed at a general meeting of the company, held at least two months thereafter, and an order made for the sale of the forfeited shares ; and even then upon payment of the calls before sale, the shares revert to the owner. There are other regulations affecting the subject. These statutory provisions make English decisions upon this subject quite inapplicable here.

When these proceedings were had we had no general statutes on the subject. The general railroad law was adopted at the session of the legislature in October, 1849. Hence in August, 1849, when these resolutions were passed, the only provision in the statute relating to the forfeiture of shares, was the single clause in the plaintiffs' charter, sec. 17, that " the directors may require payment of sums subscribed at such times, in such proportions, and on such conditions as they shall deem best, under penalty of forfeiture of all previous payments thereon." That was all.

At an early day in railway enterprises it was claimed, that where provisions for forfeiture were embodied in the charter, the

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corporation could not sue for subscriptions, but must and could enforce the payment of them only by proceedings in forfeiture. But it has long been held that the right to sue and to declare stock forfeited co-exist, and that the latter proceeding is merely cumulative. Such it was intended to be in this charter; and as the charter specifies no mode of proceeding to create a forfeiture, it is obvious that such a course of proceeding must be adopted as is reasonable and just to the stockholder.

Various suggestions have been made as to these proceedings, and their legal effect, which we will now consider.

1. We do not think that the notice of the condition upon which the stock shall be forfeited must be issued when the calls are made. That would be quite too narrow a construction of the section.

2. The votes of August 15th, 1849, do not mean that no stock shall be forfeited but that on which *all* assessments are unpaid; but rather that the shares upon which any assessments remain unpaid on the 20th September shall be forfeited.

3. The directors, long before the 15th August, had fixed the times and proportions of payments, but they had said nothing of forfeiture. There were many unpaid assessments which ought to be collected, and the stockholders on the 20th June had requested the directors to take prompt and efficient measures for their collection, and to sell shares remaining unpaid on the 1st August. On the 15th August the directors recite this vote of the stockholders, and then vote, that all stock, on which the assessments shall remain unpaid on the 20th September, "shall be and hereby is forfeited to the use of this corporation;" and the treasurer was directed to give immediate notice of the vote to all delinquents; and that all stock forfeited, by virtue of the foregoing resolutions, should be sold. We think it is quite obvious that the corporation intended that this should be the final declaration of forfeiture,—giving notice, like a decree of foreclosure, of the time when the right to redeem would be cut off. Such is the natural meaning of the language. It is not the declaration, merely, of a future intent to forfeit.

4. Is such a declaration of forfeiture reasonable? The

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declaration is made on the 15th August ; it requires immediate notice of it to be given all delinquents, and it becomes absolute on the 20th September.

There is no provision in the charter as to the length of notice, no by-law of the corporation in regard to it. Our general railroad law, in authorizing the directors to sell the stock of delinquents, says "notice shall be given," but fixes no time. We think the time here given, thirty days, reasonable.

5. Must there be a sale, in order to make the forfeiture complete? There is nothing in the charter, or the by-laws of the corporation, requiring a sale. By the charter it is the neglect or refusal to pay assessments according to the calls, that makes the delinquent's stock liable to forfeiture. The penalty is a forfeiture of "all previous payments." There is no provision by which the stock may be sold, and if the avails of the sale exceed the amount of the unpaid assessment, the surplus shall be paid to the shareholder. It is an absolute forfeiture of all previous payments. In the entire absence of everything requiring or looking towards a sale, we can not say that a sale was intended by the legislature, or must be reasonably intended as necessary to divest the title of the shareholder. The Connecticut statute provides for a sale of forfeited stock, (22 Conn. 456,) and that if the avails of the sale do not pay the assessment, the stockholder is still liable for the deficiency ; hence their decisions are inapplicable to this case. So the cases cited from 4 Exch. 417, and 16 Eng. L. and E. 55, turn upon the construction given to the statutes 8 and 9 Vict. c. 16 sec. 29, which provide that the company may declare a forfeiture, whether they have sued for the call or not ; and the substance of those decisions is, that by their statutes "the defaulter has the right to redeem at the last moment before sale." By comparing 4 Exch. 417, *Railway Co. v. Kennedy*, and 3 Exch. 18, *Giles v. Hutt*, it will be seen how these decisions turn upon the language which regulates and authorizes forfeitures. The last cited case, in the language to be construed, approaches the very general terms of the plaintiff's charter more nearly than any other English decision we have found, and by analogy, though certainly remote, sustains the

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position which the defendant here takes, that after the declaration of forfeiture in this case, the plaintiff can not sue for the assessments.

6. It is very plain to us, that it was the intent of the legislature that the company should not declare the stock forfeited, and after that sue the stockholder. The corporation can sue, or declare the stock forfeited, at their option, and may defer forfeiture till they have exhausted their remedy by suit. If they sue and collect the subscription, the subscriber remains stockholder. If they declare the stock forfeited, the stockholder loses all previous payments, and ceases to be a member of the corporation. To make him lose his previous payments and his stock, and still be liable for the deficiency which the compulsory sale of his stock fails to pay, would be injustice, unless the charter or general law made such a rule, and the subscriber signed with knowledge of it. The sensible construction of this charter is, if the subscriber lose his previous payments, that is the penalty, he is not bound to lose anything more. The company are not obliged to take the stock, so long as they can get anything by suit; but when that fails, then they may take the stock of the delinquent, and he is thereby discharged from further liability.

7. It has been much pressed upon the court that there can be no forfeiture until the company give reasonable notice to the owner that his stock will be forfeited unless by a specified time he pays the unpaid assessments; that a secret vote of directors declaring stock forfeited is wholly void. This position is unquestionably right, and it is the duty of courts, when there is no specific provision as to notice, to see to it that the actual notice is ample. It is urged, also, that here there is no proof that the corporation gave any notice of their vote of forfeiture to the defendant; that his offer of evidence does not propose to prove notice.

If we were satisfied that this point had been raised before the county court, and the testimony excluded on that ground, we should hold the exclusion right; but we think the fair construction of the bill of exceptions is, that the offer was rejected

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because it was admitted there had been no sale of the stock declared forfeited, and that until sale there was no forfeiture.

As to the motion in arrest:

We have serious doubts whether the declaration should not have alleged that the directors issued the calls for the sixteen assessments—not the executive committee.

The charter provides that the directors shall give notice, &c.

When a charter requires the directors to do some specific act, there seems to be a stronger reason why they should be held incapable of delegating such authority, than when mere general powers are conferred on them. The charter of this, as of most corporations, authorizes the directors "to transact the general business of the company," and there is no doubt that as to the ordinary routine business of the corporation they can transact it, as most companies do, through sub-committees. The duty here specified is of a class requiring some exercise of judgment and discretion, though not, perhaps, so important, or partaking so much of the judicial function as many others; but when the words thus expressly point to a particular duty to be performed by the directors, and not to general business or a class of duties, we think the fair intent of the law is that they should act as a body in regard to the particular matter, and not delegate their discretion or duty to a sub-committee. Doubtless they could ratify the acts of the executive committee, and so make their doings their own, as they appear to have done in this case. The declaration, if insufficient, could doubtless be amended in this particular, and as the case must go back for a new trial, we deem it sufficient to leave this point, with these suggestions in regard to it.

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SOLOMON J. DEWEY v. ARCHIBALD DEWEY.

[IN CHANCERY.]

Partnership. Trust. Chancery.

The orator and defendant being partners, land was purchased for the partnership use, and with the expectation that it would be paid for by the firm, but, without the orator's knowledge, the defendant took the conveyance to himself alone, and gave his note for the price, which, however, was paid by him out of the partnership funds. Immediately upon the conveyance, the firm took possession of the land, and regarded and used it as partnership property for twenty-six years. *Held*, that the defendant held the title only as trustee for the firm, and he was decreed to so convey the land as to vest the title in the same manner as if it had been originally conveyed to the firm.

BILL IN CHANCERY. The facts in the case sufficiently appear from the opinion of the court.

The chancellor, KELLOGG, J., dismissed the bill with costs to the defendant, from which decree the orator appealed.

Z. Howe and E. J. Phelps, for the orator.

E. Edgerton, for the defendant.

POLAND, CH. J. The orator and defendant are brothers, and in 1828 they commenced the business of farming, as partners, and continued it down to 1857, when they separated. In 1831 the parcel of land in dispute was purchased, and, from that time down to the termination of the partnership, was used for the partnership business, like the lands they owned jointly. When it was purchased, however, the conveyance was to the defendant alone, and he executed his note for the purchase money, though it is conceded that the note was paid with money that come from the partnership fund. The orator alleges in his bill, that the land was purchased by the mutual understanding and agreement of the parties; that it was for the partnership; that it was paid for out of the partnership funds, but that the defendant without his knowledge or consent took the conveyance to himself; that the land went immediately into the use of the partnership, and

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that he did not know for a long time that the conveyance was to the defendant alone.

The orator prays that the defendant may be decreed to convey to him one undivided half of the land.

The defendant in his answer asserts that he purchased the land for himself, without any communication or concurrence with the orator, and with no design that it should be for the use or benefit of the partnership, and gave his own note for the purchase price; that when the note fell due the partnership owed him for money advanced for the partnership use, which he withdrew for the purpose of paying the note, and that this was known and assented to by the orator.

The defendant concedes that the land went immediately into the use of the partnership, and continued to be used by them so long as the partnership existed, but this, he alleges, was done upon a special contract between him and the orator, by which the orator was to pay one-half the rents and taxes, and account to him for one-half the interest of the purchase money.

The decision of the case depends mainly upon the proper determination, on the evidence, which of these conflicting statements is the truth.

The orator testifies in substance according to the allegations in his bill, and denies what is alleged by the defendant, as to any agreement or understanding that the defendant might withdraw funds from the partnership as his own to pay the note given for the land, and also denies that the land went into the partnership use under any such contract as the defendant sets up.

The defendant testifies in substance to the same facts as he sets up in his answer, and contradicts the testimony of the plaintiff, as to the matters in dispute, very much as his answer denies the allegations in the bill.

Each is corroborated to some extent, and about equally, by the testimony of other witnesses, so that if nothing could be drawn in favor of either from the general history of their transactions, the testimony is so nearly equal as to make it very difficult to find the balance.

But the fact that this land, immediately upon its purchase, went into the use of the firm, for partnership purposes, and so

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continued for nearly thirty years, unless satisfactorily explained upon some other theory, must have a very controlling influence to show that it was bought for that purpose.

The defendant attempts to explain this upon the ground that this occupancy was under a special contract between him and the orator, that the orator should pay half the rents and taxes, and account to him for the interest on one-half the purchase money. If this is established by the proof, it affords a satisfactory explanation of the joint use, consistent with the land remaining the sole property of the defendant. The only witnesses are the two parties. The defendant says there was such a contract; the orator denies it. The fact that the orator paid half the rents and taxes affords no support to the existence of such a contract, because such payments are equally consistent with its being treated as the property of the firm, as in such case they would be paid in the same way.

But what effectually disproves, to our satisfaction, the existence of any such contract, is this: the entire failure of the defendant to prove, or even claim, that the orator ever accounted to him for the interest on one-half the purchase money of the land, as he claims he was to do by the agreement, and as he should in justice have done, if the land was the private property of the defendant, and paid for out of his own private funds. This fact has increased force, when considered in connection with what both agree to have been their practice, to close up and even off their joint dealings, and divide the avails every year. It is certainly hard to believe that the defendant would allow the orator to have one-half the use and benefit of this land for so long a period of time, if it was his sole property.

The long continued use of this land by the partnership, for partnership purposes, is therefore left to have its full effect toward the establishment of what the orator alleges; that it was bought for the purpose, and paid for by the firm, and we regard it as quite controlling for that purpose.

The defendant concedes that when the note was finally paid, that he gave for the land, it was paid out of money that belonged to the firm, but claims that the firm were indebted to him, and

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that he took the money out as payment of his debt against the firm, so that it became his private funds.

But all this is denied by the orator, and as the burden of proof as to this fact we think is on the defendant, we can not regard it as proved, and what has already been said shows the improbability that the payment for this land was regarded as a payment by him. We find the facts, therefore, substantially as claimed by the orator, that when this land was bought, it was bought for the partnership use, and with the expectation that it would be paid for by the firm; that when it was paid for, it was paid in partnership funds, as such, and that it was ever after regarded and used as partnership property, during the existence of the firm.

This result of our finding of the facts, relieves the case from the necessity of considering many of the legal points discussed in the argument. The argument for the defendant that the claim of the orator must stand on the ground of a resulting trust, and that such trust could not be raised in this case, has all been based upon the supposition that the defendant, when he made the purchase, and took the conveyance, made it for himself, and for his own use, and that the subsequent payment of his note by partnership funds, would not raise a trust, because that must arise at the time of the conveyance. But as we find that when the defendant made the purchase, and took the conveyance, he was acting for the firm, and as a partner, it brings the case within the common doctrine of agency, as partners, acting in the partnership business, always act as agents for the firm. If the defendant, in taking the conveyance to himself, really intended to defraud the firm, or his partner, then there could be no doubt as to the right of the firm to claim the benefit of the purchase. But we do not regard it as at all essential that he should have intended any fraud, in order to make the property in equity that of the firm, and we are of opinion that partners, who in all matters affecting their joint interest, stand in a fiduciary relation to each other, are to be regarded in a very different light from parties who deal with each other as mere strangers.

The well established rule in this country in equity is, that

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real estate bought for partnership purposes, and on partnership account, is regarded as becoming a part of the partnership stock, and will be dealt with in equity as such.

So it is a settled rule, that where partnership funds are used to pay for real estate, and the legal title is taken to one partner, he holds it in trust for the firm.

In Story on Partnership, secs. 92 and 93, it is laid down as follows: "In cases where the real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial in the view of a court of equity, in whose name or names the purchase is made, whether of one partner, or all; whether in the name of a stranger, or one of the firm. In either case, let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are *cestuis que trust*."

The counsel for the defendant have argued that no trust could be raised in favor of the firm, in the defendant, because he gave his own note; that that must be treated as a payment on his own account; but in our view, where a partner purchases property for the firm, and gives his own note for the price, as between him and the firm, it is to be regarded as the debt of the firm to pay, as he acts in the transaction as the agent of the firm.

In *Coder et al. v. Huling*, 27 Penn. 84, the lands in dispute were bought by one partner, who took a deed to himself, and gave his notes for the purchase money, but it being shown that the notes were paid off by partnership funds, it was held that such partner held the title in trust for the partnership.

The defendant relies mainly on the case of *Pennock v. Clough*, 16 Vt. 500. In that case the defendant purchased a farm, took the conveyance to himself, paid part of the price, and gave his notes for the balance. The orator claimed that the defendant made the purchase for him, and that he had repaid the defendant part of the purchase money, and offered to pay the residue, and claimed a conveyance to himself, which the defendant refused to give. There was much conflict as to what the facts were, but in the opinion given by Judge BENNETT, he states the facts as follows:

"We think, then, all that the orator can claim from the proofs in the case is, that the defendant was authorized by the

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orator under a parol agreement, to purchase the farm of Clark in his own name, in trust for the benefit of the orator, and to deed to him thereafter, upon a future arrangement between them, either upon principles then settled upon, or upon such as should thereafter be agreed upon."

The court decided that no valid trust was established, there being no written evidence of it, and no payment of any part of the price by the orator till long after the conveyance. It will be seen from this statement of the case that it differs very widely from the case in hand, and it deserves, also, to be mentioned that the orator in that case had never been in possession at all.

In *Pinney et al. v. Fellows*, 15 Vt. 525, the subject of trusts was quite largely examined by Judge BENNETT, who gave the opinion.

The substance of that case was: Mrs. Pinney, having some property of her own, and a poor thriftless husband, contracted with Judge Aiken for a piece of land, for the price of four hundred dollars, paid one hundred dollars down, had a deed made to her son, who gave his note for the balance of the price, and a mortgage back of the land to secure the same. Mrs. Pinney and her husband went into possession of the land, and resided upon it for several years, and in the mean time Mrs. Pinney paid off the mortgage given by her son. The defendants, being creditors of her son, who held the title, levied upon the land, and set it off in satisfaction of their debts. The bill was brought by Mrs. Pinney to protect her equitable title against the defendants. Among the testimony taken in behalf of the orator, was that of her son, who testified that the deed to him was in trust for his mother.

The court held that as to the one hundred dollars paid by Mrs. Pinney at the time of the purchase, there was a resulting trust, but as to the residue there was none, but they further held that the son's written testimony, given long after all his title had become vested in the defendants, was sufficient to satisfy the statute of frauds, and uphold a trust for the residue. For myself, I must say that this mode of upholding the trust is wholly unsatisfactory, and seems frivolous and absurd, though I should say that her entering upon the land, paying off the mort-

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gage, and her long and open possession of the land, which was notice to all the world of her title, was sufficient to entitle her to claim a conveyance, on the ground of a full performance.

And if necessary, I should feel willing to uphold the title of the partnership to the land in this case upon the same principle, but the case is not put upon any such ground, and what is said in this connection, is a suggestion of my own only.

It has also been suggested by the defendant's counsel, though no distinct point is made, that if this land is partnership property, the defendant ought not to be decreed to convey one-half of it to the orator, as there may be partnership debts, and unsettled partnership dealings, so that he may not be entitled to have one-half on a settlement and division. It does not appear, but that all partnership debts are paid, and all partnership matters settled, except this, and if so, then all that would be left to be done, would be to equally divide this land, but as there may be partnership liabilities, and other unsettled partnership matters between the parties, the decree for the orator should leave the title in the same manner, as if it had originally been conveyed to the firm, and so liable to all the equities that may attach to it, as partnership property in their hands. The decree of the chancellor dismissing the bill, is therefore reversed, and the cause remanded, with directions to enter a decree for the orator accordingly.

State v. Remelee.

STATE OF VERMONT v. JOHN REMEELEE.

Criminal Law. Appeal. Intoxicating Liquor. Jurisdiction.

On an appeal from the judgment of a justice of the peace upon a complaint for selling, furnishing and giving away intoxicating liquor contrary to law, the county court may try the respondent for other offences than those in regard to which evidence was given before the justice, provided such additional offences were within the justice's jurisdiction under the original complaint.

The facts in this case are stated in the opinion of the court.

C. C. Dewey, for the respondent.

W. H. Smith and *E. Edgerton*, for the prosecution.

PECK, J. In this case it appears that a complaint was presented by a town grand juror against the respondent for selling, furnishing and giving away intoxicating liquors without authority, contrary to the statute on that subject. The complaint is in that general form prescribed by the statute. On trial before the justice the respondent was found guilty of eight offences, and sentenced to pay a fine of eighty dollars and costs. The respondent appealed, and the case was tried by jury in the county court at the September Term, 1862.

On trial in the county court the attorney of the government called a witness who was not used as a witness in the trial before the magistrate, and offered to prove by him that the respondent, on several occasions, at Rutland, in 1862, previous to the exhibition of the complaint, sold, furnished and gave away intoxicating liquor, as charged in the complaint, conceding at the same time that the offences he so offered to prove, were other than, and different from, and in addition to, those proved, or attempted to be proved, on the trial before the justice. This was objected to on the part of the respondent, but admitted by the court, and the witness testified according to the offer. To this the respondent excepted. The jury returned a verdict, guilty of ten offences, being two more than the respondent was convicted of before the justice.

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The only question in the case is whether that ruling was correct—whether it was competent for the government on this appeal to introduce evidence of distinct offences, not attempted to be proved on the trial before the justice.

The county court in the trial of the case had only appellate jurisdiction, and could not take cognizance of any offences, except such as were brought up by the appeal. The complaint before the justice was broad enough to include all the offences of which the county court took cognizance, including those offences, the evidence of which the respondent objected to. In point of law these offences did not exceed the justice's jurisdiction; so that the justice might legally have tried, under this complaint all the offences of which the county court took cognizance. But it is insisted that the county court had jurisdiction of those offences only which the justice actually tried. If the appeal brings up for trial only such offences as the justice actually heard and tried, the county court erred in admitting the evidence of the additional offences. But no principle is better settled than that an appeal brings up the whole case, and that the jurisdiction of the appellate court is limited only by the limits of the court from which the appeal is taken. The justice once having acquired jurisdiction of the offences in question under the complaint, that jurisdiction was not lost by the neglect of the government to prove these offences before the justice; therefore, on appeal the whole case is open for proof in the appellate court, to the extent of the original jurisdiction of the justice, under that complaint.

Suppose the information or complaint to have been brought originally in the county court, and a trial had, and on exceptions or on motion, a new trial is granted, could the respondent limit the government on a second trial, to proof of the identical sales attempted to be proved on the former trial? It is clear he could not. It is difficult to distinguish that case from this, unless we say that the appeal brings up only the question of the legality or propriety of the judgment of the justice upon the evidence on that trial. But the appeal vacates the justice's judgment, and brings up the whole case and opens it for new proof, to the

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extent of the original jurisdiction of the justice upon the complaint before him. Suppose a civil suit is brought, and the plaintiff produces no evidence in support of his claim, and submits to a judgment against him, and appeals. If it is true that the appeal brings up nothing except what the plaintiff attempted to prove in the court below, the plaintiff in the appellate court could introduce no evidence whatever, and must submit to a judgment in the appellate court, because he introduced no evidence in the court below. Every day's experience tells us that no such limited construction has ever been given to an appeal in a civil suit; and although in criminal cases the right of appeal is given only to the respondent, yet, when taken by him, no reason is perceived why its operation in transferring the entire jurisdiction of the case to the appellate court, should not be the same as in a civil suit.

Not only were these additional offences within the scope of the complaint before the justice, and within his legal jurisdiction, but for ought that appears they were among the offences for which the grand juror *in fact* presented the complaint, and as his neglect to introduce evidence in support of them did not cause the jurisdiction to lapse, these offences were legally before the county court for trial, and the evidence objected to was properly admitted.

The respondent's exceptions are overruled.

State v. Haynes.

STATE OF VERMONT v. HIRAM HAYNES.

*Motion to Dismiss. Pleading. Jurisdiction. Intoxicating Liquors.
Evidence. Judgment.*

A motion to dismiss an appealed criminal prosecution on the ground that the justice of the peace from whose judgment the appeal was taken, acted as attorney for the state upon the trial before himself, was held to have been properly overruled; *first*, because the fact objected to did not appear on the record; and *secondly*, because the motion was not filed till the respondent had pleaded not guilty, and proceeded to trial in the county court.

If a respondent in a prosecution for the unlawful sale of intoxicating liquor, plead guilty to a certain number of offences, without specifying in his plea the times at which such offences were committed, the record becomes conclusive, under the act of 1855, (Acts of 1855, No. 3, p. 8; Gen. Stat. chap. 94, secs. 37, 38,) that such offences were committed on the day stated in the complaint; and in another prosecution for offences committed prior to the day alleged in the complaint first tried, the respondent can not prove by parol that any of such offences are the same ones to which he pleaded guilty in the former prosecution.

PROSECUTION for the unlawful selling, furnishing and giving away of intoxicating liquor, originally brought before a justice of the peace, from whose judgment the respondent appealed to the county court.

The facts in the case are sufficiently stated in the opinion of the court.

Chauncey K. Williams, for the respondent.

E. Edgerton, for the prosecution.

ALDIS, J. I. After the trial in the county court had commenced, and while it was in progress, the respondent filed a motion to dismiss, alleging that the justice of the peace, who tried the case, and from whose judgment this appeal was taken, acted as attorney and counsel for the state upon the trial before himself. The court refused to entertain the motion.

1. The motion was not founded upon any fact or matter of record apparent upon the face of the proceedings; but stated an extrinsic fact, which could only be proved by parol evidence.

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As no plea can be made, no issue taken upon a motion to dismiss, it is obvious that such a motion was an inappropriate mode of bringing the fact before the court. A motion to dismiss should be founded upon facts appearing of record, or admitted and shown by the plaintiff's own proofs.

2. The motion was not filed till the respondent had pleaded not guilty, and proceeded to trial upon that issue. By thus pleading and entering upon the trial upon its merits, he had waived all mere dilatory pleas. The rules of pleading, and the orderly dispatch of business, alike require that pleas to the jurisdiction, especially when they involve issues of fact that may be disputed, should be pleaded before coming to a trial upon the real cause of action. It is true that where a court discovers at any time that it has no jurisdiction of the subject matter, or of the parties, it will on motion dismiss the suit. But here the court apparently had jurisdiction, both of the subject matter and of the party. The misconduct of the justice (if it existed) in acting as counsel for the prosecution upon the trial, would not show that he had not originally jurisdiction of the case. It was not the duty of the court, when no such fact appeared, to stop the progress of the trial, and make up a collateral issue, and have an investigation, to ascertain whether such misconduct existed on the part of the magistrate.

The motion was properly denied.

II. This prosecution was by complaint of a grand juror, exhibited to the justice of the peace on the 19th December, 1861. Two witnesses testified to offences committed prior to that date—offences against the law regulating the sale of liquors. At the September Term, 1862, the respondent was indicted for similar offences,—the indictment alleging the offences to have been committed on the 12th September, 1862. Upon this indictment he pleaded guilty to nine offences, but did not specify any day or days on which the offences were committed. Upon this trial he offered to show that the offences which the two witnesses here testified to were the same to which he had thus pleaded guilty.

The county court refused to allow him to prove these facts, to which the respondent excepted.

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The question arises, was the respondent barred by the record upon his pleas of guilty, from showing these facts ?

The act of 1855, No. 3, (Acts of 1855, p. 8,) enacts in regard to offences for selling liquor in violation of law, that when a party shall plead guilty to the offences charged in the indictment, "such offences shall be taken, held and considered to have been committed on the day specifically set forth in the indictment as the time when such offences were committed ; unless the respondent, at the time of pleading guilty, shall specify some other day or days on which such offences were committed, an entry of which shall be made upon the indictment, and become a part of the record. The judgment rendered on the plea of guilty, as aforesaid, shall not be a bar to any subsequent prosecution for any other offences than the specific offences specified in the indictment, or by the respondent. If on any subsequent proceedings it shall be made to appear that such person has been guilty at any other time or times than is specified in such prior proceedings, as aforesaid, such person may be proceeded against therefor in the same manner, and to the same extent, as though such other offences had been committed subsequent to such prior judgment."

By the practice before this statute was passed it was held—that a conviction, or a plea of guilty, upon an indictment for selling liquor, was a bar to any subsequent prosecution for any offence committed prior to the finding of the indictment. As this is a class of offences in which the violations of law were very numerous, and of almost continual occurrence, liquor dealers were happy to have a conviction for a single offence, or even for a small number of offences, or a plea of guilty for the same, entered against them. Thereby the fine, usually a small one, when compared to the real number of the offences committed, would protect them from all danger for past offences ; and thus, the old score being wiped out, they were the more ready to run their risks for future violations of the law. Hence this act arose, its object being to specify by the indictment, or on the record, the offences for which the party was tried or pleaded guilty, and have the plea or judgment protect only such identical offences.

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To secure this end, as the indictment does not specify by time, place, person, or otherwise, any particular act, but only names the offence and the day on which it is alleged to have been committed, (a vague and general mode of averment, used only in this class of cases,) and leaves it open for the government to prove any number of offences, and on any day or days within the statute of limitations,) it became necessary that in some way the specific offence should appear of record. This statute provides that the respondent, in pleading guilty, may specify on what day or days he committed the offence, and that shall be entered of record. He is supposed to know when he has been guilty, and to what offences he means to so plead. The spirit of the statute is that he shall be able fully to protect himself against any second trial and punishment for offences for which he pleads guilty, but that his plea shall not protect as to any offences except those very ones which he thereby confesses. If he does not specify the offences so that they can appear of record, then the law specifies them for him, by assuming that he pleads guilty for offences committed on the day named in the indictment.

Thus, by specification of the respondent, or by construction of law, the offences are definitely ascertained, so far as fixing the day on which they were committed can accomplish that result; and the judgment is not a bar to the prosecution of any offences except those so specified.

This act, by requiring the offences to be specified on the record, intended, as we think, to exclude all other evidence, and to make the record the only proof, except as to offences committed on the day named in the plea or indictment. Such is the ordinary legal operation of records. There is nothing in the language of the statute to indicate an intent to make this an exception, and give to the record only the force of *prima facie* proof. On the contrary, its clear and specific provisions seem to be framed with the intent to make the record conclusive on the point. If the respondent does specify his offences, he could not be permitted to prove afterwards that he intended to plead to different offences from those he has set forth on the record. He could not be allowed to say in his plea, "I am guilty of an offence committed

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on the 12th September, 1862," and afterwards claim, on another trial, that he meant an offence committed on the 19th December, 1861.

If he does not specify, no one can tell what particular acts he means to acknowledge; and if the record is held only as *prima facie* proof, and open to be rebutted, how can his intent be shown, or what shall be the rule by which to determine what acts the plea shall apply to? If we say those offences which the government intended to establish by proof, the application of such a rule would be difficult. The government often does not know what it can prove in such cases. It is not bound by precise averments in the indictment, as in ordinary criminal cases, because from the nature of these trials, proof of particular acts is uncertain and difficult to be obtained, and hence the inquiries of witnesses are often and necessarily mere experiments, to see what can be proved.

Again, the government may expect to prove many—say twenty offences. The respondent has pleaded guilty to five. Shall these five apply to any of the twenty that may afterwards be brought up on a future trial? If not, to which of the twenty?

Again, how shall the intent of the government be shown? By the recollection of the state's attorney? By what witnesses, who were summoned, or who expected to attend, will swear that they would have testified to if they had been examined? Nothing could be more indefinite—nothing more unsafe than such evidence, to give force and direction to a record. Records should speak for themselves, as to what they conclude, and what they do not.

It seems to us that the object of the act, its language, the mischief to be remedied, and the inadequacy of the remedy to prevent the mischief, if we hold the record open to be applied by parol evidence to any offences for which the respondent may afterwards be tried, all clearly indicate that it was the intent of the legislature to make the record conclusive; to express by legal construction the intent of the offender, if he would not express it for himself. If he is silent when he might speak, we

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may well suppose it is because he is willing to have the law speak for him.

The phrases "subsequent prosecution," and "subsequent proceedings," when used in this act, apply rather to the time of trial, than to the time of commencing the prosecution. The whole intent of the act, and the language of the third section, require such a construction of these phrases. If we hold otherwise, we have this singular result, that the respondent, by pleading guilty to the last prosecution, may defeat all prior prosecutions against him, and yet remain liable for the same offences, if a subsequent prosecution was commenced against him.

The judgment of the county court is affirmed.

STATE OF VERMONT *v.* HIRAM HAYNES.

Practice. Intoxicating Liquor. Supreme Court.

Where, in a prosecution for the illegal sale of intoxicating liquor, exceptions are taken by the respondent to the ruling of the county court, if the prosecuting attorney desires to have the sentence more severe because of the fact that the respondent has been previously convicted of a similar offence, he must prove such fact in the county court before the cause passes to the supreme court. Such proof can not be received in the supreme court, even for the purpose of affecting the sentence which such court are about to render, after having overruled the exceptions.

The facts of this case are stated in the opinion of the court.

POLAND, CH. J. The respondent was convicted in the county court of four offences for furnishing intoxicating liquors, upon trial on a complaint in the general form prescribed by the statute.

The case was brought to this court by the respondent, upon

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certain exceptions taken by him at the trial, and the sentence was respited. The case having been heard here, the exceptions were overruled, and the prosecuting attorney moved for sentence against the respondent, and offered in evidence certified copies of records of two former convictions of the respondent, for offences of the same character, and claimed that this court should sentence him as provided by the statute for a third offence.

To the introduction of these records, the respondent objected, insisting that such evidence could not be received here, but that to enable this court to act upon it, it should have been introduced upon the trial before the jury, or at least in the county court in some form, so as to come up before this court with the record from the court below.

In *State v. Freeman*, 27 Vt., it was decided, that the provision of the statute that it should not be necessary to allege a prior conviction in a complaint or indictment for violations of the liquor law, was valid, and that in order to make such former convictions available to procure the increased punishment, provided for the second or third offence, it was not necessary that they should be shown upon the trial of the complaint or indictment, but might, after conviction, be shown to the court, in order to affect the sentence.

It was said by the court in that case that if, upon such record being produced, on motion for sentence, any issue of fact was made, the county court, or this court, might send it to a jury for trial.

With that decision, so far as it holds that it is unnecessary to show the former convictions upon the trial before the jury, we are entirely satisfied. The illegal acts of selling or furnishing charged, are in no way affected by the former conviction, so far as the proof of their commission is concerned, and the validity of the former convictions could not be passed upon, without departing entirely from the issue made by a plea of not guilty to the complaint or indictment.

The former convictions are matters affecting only the sentence, which it is the exclusive duty of the court to pass, and as they must always be proved by the production of the record, their

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legal validity to affect the sentence must usually rest mainly with the court.

It is apparent, however, that there might always be at least one question of fact ; that is the identity of the respondent with the person named in the record of the former conviction, which, if the respondent desired, he should be permitted to have tried by a jury, and if that or any other question of fact should arise, the county court could send it to a jury to determine.

It is objected that this should not be done, as thereby the respondent would be really subjected to the expense of two trials for one offence. If this were really to be expected in every case, or in many cases, there would be force in it, but it is hardly supposable, that a case will really arise where an attempt will be made to subject a respondent to the penalty of a second or third conviction, by force of a former conviction of another person.

The right of trial by jury upon such a question is rather fanciful than real, but as such a case may possibly arise, it should be guarded and protected.

The other objection, that this evidence ought to have been introduced in the county court, and all the facts ascertained there, to ascertain what sentence should be imposed, we think is more substantial. In this court, we have no jury to try issues of fact, and though we might send an issue to the county court for trial, that might furnish a necessity for bringing the case again before this court, and thus occasion great delay and expense.

In our opinion the better practice is to require all these matters to be introduced and determined in the court below, and though the court may desire to stay sentence, that need not prevent them from settling everything needful to show what the proper sentence should be, before sending up the case on exceptions.

Another reason why we think the records of former convictions should be presented in the county court, and passed upon there, is this : the respondent is entitled to have the opinion of the county court upon every question of law presented by his case,

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and if in his favor, the decision is final, as the state can not except, but if the state are allowed in this court to introduce new evidence, and have this court pass upon it, this right is lost to the respondent.

We are of opinion, therefore, that these records should have been introduced in the county court, and that we ought not to receive them here, but as the counsel for the state might, from what was said in *State v. Freeman*, *ubi sup.*, have supposed they would be equally available here, we think the state ought not to be deprived of the benefit of them.

The case is therefore remanded to the county court for sentence, where, if any question of law or fact arises thereon, it can be properly tried.

JACOB EDGERTON v. ENOCH SMITH, *appellant*.

Jurisdiction. Justice of the Peace. Recognizance.

In an action of debt upon a recognizance in the usual form to the defendant for the costs of prosecution, brought to recover the defendant's costs in the original action, the matter in demand, as respects the jurisdiction of the court, is the amount of such costs, and not the amount of the recognizance.

DEBT on a recognizance, brought into the county court by appeal from the judgment of a justice of the peace. The facts are stated in the opinion of the court. Upon the entry of the appeal in the county court, the defendant demurred specially on the ground that the court had no appellate jurisdiction.

The county court at the March Term, 1862, PECK, J., presiding, *pro forma* overruled the demurrer, and rendered judgment for the plaintiff, to which the defendant excepted.

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R. R. Thrall, for the defendant.

J. Prout, for the plaintiff.

ALDIS, J. This is an action of debt on a recognizance. The recognizance was taken before the county clerk, in the sum of two hundred dollars, upon the issuing of a county court writ. It is in the form as expressed in the statute, "that the plaintiff shall prosecute his writ to effect, and shall answer all damages, if judgment be rendered against him." The plaintiff failed in his suit, and there was a judgment rendered for the present plaintiff, (the then defendant,) for his costs. The costs were assessed by the court at thirty-two dollars and sixty-six cents, and this is a suit brought before a justice of the peace upon the recognizance, setting forth the above judgment for thirty-two dollars and sixty-six cents for costs. The question is: had the justice of the peace jurisdiction?

Justices have jurisdiction where the matter in demand does not exceed one hundred dollars. Is the matter in demand the amount of the recognizance, or only the judgment for costs, as stated in the declaration?

1. If a judgment be rendered for the plaintiff in this suit, it must be, not for the amount of the recognizance, but for the thirty-two dollars and sixty-six cents costs recovered by this plaintiff, as defendant in the former suit.

2. All that this plaintiff can recover is the former judgment for costs. "The damages," which the defendant was recognized to answer, can not be anything more or other than the costs as taxed in that suit for the defendant. These were there ascertained, a judgment rendered for them, and that judgment is set forth in this declaration, on the recognizance, as the plaintiff's claim. It is the measure and extent of the plaintiff's possible recovery in this suit. He can not recover more. The matter in demand, then, in substance, must be less than one hundred dollars.

The recognizance is not like a recognizance for an appeal from a justice, or for a review under our old practice, where the party is recognized for intervening damages; and where, there-

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fore, the damages are open, not limited by a former judgment, or restricted by averments in the declaration. The case of *Clark v. Campbell*, N. Chip. 57, is relied on by the defendant; but that was where the recognizance was substantially for intervening damages. The chief justice, in delivering the opinion of the court, says: "It is claimed that the costs are legal costs, and are capable of ascertainment by a known standard—the fee bill. But this is not so. The defendant, on the plaintiff's failing to prosecute, is entitled to be paid for his time spent and money expended in preparing for his defence. The damages are wholly at large, and are to be ascertained by assessment." The tenor of the opinion throughout favors the idea that when the damages and costs have been ascertained, and are fixed, and are set forth in the declaration, then the amount of such judgment, and not of the recognizance, is really the matter in demand.

In *Southwick et al. v. Merrill*, 3 Vt. 320, which was an action of debt on a judgment for five hundred and sixty-three dollars and fifty cents, brought in the county court, but which had been reduced on the record by an endorsement of five hundred and thirty three dollars and eighty-six cents, so as to bring the balance below one hundred dollars, although the endorsement was not stated in the declaration, the court held that the county court had no jurisdiction, and dismissed the action. PRENTISS, Ch. J., in delivering the opinion, says: "In actions on penal bonds, as the penalty is the debt at law, and judgment is regularly to be entered up for that, the question of jurisdiction must be determined by the amount of the penalty, without regard to the damages which the plaintiff may be entitled to recover on the breaches assigned. And in all cases where, by the rules of pleading, the plaintiff, in the form of action he adopts, is bound to declare for the original amount of his claim, and can not demand in debt or damages, according to the nature of his action, less, it is immaterial, as to the question of jurisdiction, what is the sum actually due." It is quite plain that in debt on recognizance, to recover a former judgment for costs, the plaintiff can not only demand in debt the sum then due, but by averring it in his declaration, is bound to prove it, and can not recover more.

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The old mode upon all penal bonds was to render a judgment for the penalty, and on motion to chancer the bonds,—as is still the case upon bonds given in criminal cases.

But we are not aware that in actions of debt upon recognizances for costs, it has ever been the practice to render a judgment for the whole amount of the recognizance. It is only by holding that strictly and technically the recognizance is the debt, that we can say that it is the matter in demand, and must therefore be the measure of jurisdiction. We do not deem it wise to adhere to a technicality, which is not and can not be true in fact, which theoretically makes the plaintiff's claim what his averments upon the record deny it to be, and what he can not be permitted to either claim or prove; when the only effect of adhering to such a fiction is to oblige parties to resort to a jurisdiction, and to incur costs and expenses which the law never intended they should be burdened with.

The tendency of the decisions in this state has been to conform the practical jurisdiction of our courts to the actual claims and rights of the parties, as regulated by our legislation; and to incline to sustain the jurisdiction, when resorted to in good faith.

The case of *Hair v. Bell*, 6 Vt. 33, where an entire contract for work, to the amount of one hundred and eighty dollars, with averments showing the amount due to be less than one hundred dollars, was brought before a justice; of *Bishop v. Warner*, 22 Vt. 591, where the *ad damnum* exceeded one hundred dollars, but the judgment described was within a justice's jurisdiction; of *Parkhurst v. Spalding*, 17 Vt. 527, where the judgment was less than one hundred dollars, but with interest would exceed one hundred dollars, and the *ad damnum* was only one hundred dollars, and on appeal to the county court the declaration filed there claimed to recover only the *debt* and not *damages* or interest, show how the forms of proceedings give way to the actual claims of the parties in determining the question of jurisdiction.

In this case we think the justice had jurisdiction, and the judgment of the county court is affirmed.

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E. B. BOND AND S. GREEN v. JONATHAN B. CLARK.

Warranty. False Representations. Sale. Evidence.

A simple affirmation is not a warranty, unless it was so intended and understood by the parties; and whether such was the intent and understanding is a question of fact.

In the case of a written contract of sale, containing no warranty, parol evidence is inadmissible to prove a warranty in connection with the sale.

The mere fact that a vendor made fraudulent representations respecting the article sold, and that the purchaser relied thereon, is not sufficient to sustain an action on the case against the vendor for such false representations. It must also appear that the vendor knew they were false.

CASE for the breach of a warranty in the sale of a patent right for "S. P. Francisco's celebrated Atmospheric Butter Churn," and also for false representations in making such sale. The action was referred, and the referees reported as follows :

"We find that previous to July 10th, 1854, the defendant was the owner of a patent right, known as S. P. Francisco's Atmospheric Butter Churn; that about this time the plaintiffs entered into a negotiation with the defendant for the purchase of an interest in such patent in and for the county of Orange, in this state, and that in such negotiation between the parties, the defendant made extravagant representations of the superiority of this churn to all others in use; that it was a valuable and useful invention; that it was in great demand, and was fast coming into general use. These representations were made verbally, as well as by a printed circular, in the following words :

'100 DOLLARS REWARD!—Will be paid for the production of a churn superior to S. F. Francisco's celebrated Atmospheric Butter Churn, which, from its peculiar build and simple construction, makes a very cheap and durable machine, obviating all objections to complicated and expensive churns. This scientific churn has not an equal for making and gathering butter, in quality or time, as we can make hard and sweet butter in one-eighth of the time usually spent in churning. The patentee and his agent are in possession of medals, premiums, and certificates, received at the different state and county fairs, mechanical

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institutions, &c., sufficient to satisfy all in regard to the character of this churn, which for durability, convenience, economy and practical utility, cannot be surpassed, and we defy the world for an equal. This purely scientific, labor-saving machine has been examined by most of our scientific and practical dairy-men, who all admit that in this churn is all that is required. This churn received the first premium at the recent New York state fair, held at Saratoga. Also, at the last Rutland County fair. We would therefore invite all persons interested in improvements to call and examine this churn.

And as there is money to be made by manufacturing, selling and using the above churn, we invite the attention of all, and especially those wishing to enlist in a profitable business. The undersigned having purchased the right of the state of Vermont, are prepared to sell county or town rights, on favorable terms. Communications should be addressed to

JOHATHAN B. CLARK, Danby, Vt.

GEORGE WILLARD, Pawlet.

The churn and the proprietors can be seen, for a few days, at ———.

We further find that prior to the purchase of this right from the defendant, neither of the plaintiffs had seen, or were permitted to see, the operations of this churn, except upon water, and that the plaintiffs, relying upon the aforesaid representations of the defendant, on the 10th day of July, 1854, did purchase of the defendant the right to make, use and vend the said churns in Orange county, and took a conveyance therefor from the defendant, and paid him therefor on the day of said conveyance the sum of three hundred dollars. This conveyance contained no warranty, nor any representations in regard to the value or excellence of the churn, or the patent right.

We further find that all the aforesaid representations of the defendant to the plaintiffs, as to the qualities and utility of said churn, were untrue and false, and that it was not in great demand and coming into general use, and that the same was and is of no value.

We further find that after the plaintiffs found that the said patent was of no value, they ceased all efforts to sell and dis-

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pose of the same, but soon thereafter made known to the defendant that they had been deceived by him about the said patent, and offered to re-convey the whole right to him, and requested him, the said defendant, to pay back to them, the said plaintiffs, the money they had so paid to him for said right, but the defendant declined to take a re-conveyance, or to pay back the money as requested.

If from the foregoing facts the plaintiffs are entitled to recover, we find for the plaintiffs to recover of the defendant three hundred dollars and the interest from the 10th day of July 1854, to the 10th day of September, 1860. But if the plaintiffs are not entitled to recover, then we find for the defendant to recover his costs."

Upon this report the county court, at the March Term, 1862, PECK, J., presiding, *pro forma* rendered a judgment for the plaintiffs, for the sum named in the report, to which the defendant excepted.

J. B. Bromley and E. Edgerton, for the defendant.

Spencer Green and E. N. Briggs, for the plaintiffs.

PECK, J. The question principally discussed in this case is, whether, upon the facts reported by the referees, the plaintiffs are entitled to recover. It appears by the report, in connection with the written assignment or transfer from the defendant to the plaintiffs, that on the 19th June, 1849, letters patent were granted to Samuel P. Francisco for certain improvements in atmospheric churns; that at the time of the sale in question the defendant owned the right under that patent for the state of Vermont; that on the tenth day of July, 1854, the defendant sold his right for the county of Orange, and made a written transfer of it to the plaintiffs, by an instrument, a copy of which is annexed to the report. No question is made as to the validity of the patent, or as to the defendant's title. The referees find that at the time of the sale in the negotiation, "the defendant made extravagant representations of the superiority of this churn to all others in use, that it was a valuable and useful

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invention, that it was in great demand, and fast coming into general use;" that these representations were made verbally, as well as by a printed circular, annexed to the report. On looking at this circular we find various representations of the comparative excellencies of this churn, and its superiority over all others; some of which are of rather a general character. Perhaps the most prominent and pointed among these representations, found to be untrue, is the one in these words: "This scientific churn has not an equal for making and gathering butter in quality or time, as we can make hard and sweet butter in one-eighth of the time usually spent in churning." There is also a representation as to its having taken the premium at various agricultural fairs, which for aught that appears was true. The referees find that all the representations as to the qualities and utility of the churn were false, and that it was not in great demand and coming into general use, and that the same is and was of no value; that prior to the purchase, "neither of the plaintiffs had seen, or were permitted to see the operation of the churn, except upon water," and that the plaintiffs made the purchase relying on the representations of the defendant. No warranty by the defendant appears, unless such is the necessary legal effect of the representations. It is claimed by the plaintiffs' counsel that such is the legal effect. But a simple affirmation is not a warranty, unless it is so intended and understood by the parties, and whether such was the intent and understanding is a fact to be found by the triers of the facts. Where an affirmation is so found to have been mutually understood by the buyer and seller as a warranty, it is a part of the contract, a binding engagement, which obliges the seller to make it good, whether he did or did not know that it was untrue. But if not understood at the time by the parties as a warranty, it is no part of the contract, although it may have been one of the inducements that influenced the purchaser to enter into the contract. In such case the seller is not liable merely from the fact that the representation is false, as in case of a warranty he would be, but it must also be shown that the seller knew it to be false. The sense in which the affirmation is understood by the parties is therefore very material to their rights, as on that, in the

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absence of fraud, depends the liability of the seller, when the representation turns out to have been untrue. Before the court can pronounce a simple affirmation a warranty, it must be found by the triers of fact that it was so understood by the parties. This principle was recognized in *Beeman v. Buck*, 8 Vt. 53, and expressly so decided in *Foster v. The Estate of Cadwell*, 18 Vt. 176. In that case the proof was that at the time of the sale the seller was enquired of by the plaintiff if the sheep were sound and free from the foot rot, and he replied, "they are sound and free from the foot rot." There was nothing in the case in any way qualifying this explicit representation. The county court charged the jury that if they found the representation as the witness testified, it would amount to a warranty. The supreme court reversed the judgment, on the ground that the representation was not in legal effect a warranty; and held that it should have been left to the jury to find whether the parties mutually understood it as a warranty, and also held that unless the jury so found, it was not a warranty, and would not make the defendant liable, unless he knew at the time of the sale that the representation was false.

Jones v. Bright, 5 Bing. 533, (15 Eng. Com. L. 529,) is cited by the plaintiffs' counsel to show that the representations in this case amount to a warranty, or that a warranty is implied. That case, as to some of the principles therein laid down, has been questioned in subsequent cases. But that case differs from this, and is not an authority to the extent claimed. In that case the plaintiff applied to the defendant, and informed him he was in want of some copper to sheathe a vessel, and the defendant replied, "I will supply you well." The copper was not then examined, selected, or delivered, nor does it appear that the plaintiff saw it. It was afterwards taken by the plaintiff's ship-builder. The contract was an executory contract, and not a sale on inspection at the time of the alleged warranty. Besides, the declaration alleged, and so was the proof, that the defendant was a manufacturer of the article. Some of the court held that there was an express warranty, but the case turned mainly on the distinction between a mere seller, and a manufacturer of an article, who sells his own manufacture, the court holding that

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in case of the latter there was an implied warranty that the article manufactured and sold by him was fit for the use for which he knew it was purchased. The case at bar is not the case of the sale of an article manufactured by the seller, it is the sale of a right to manufacture an article under a patent. Nor is the seller the patentee; he sells a right which he has purchased. It is impossible to put the case at bar upon the ground of an express warranty.

In addition to the reasons already given, the contract is in writing, containing no warranty, and the written contract excludes parol proof of a warranty. If any authority need be referred to for this proposition, *Reed v. Wood*, 9 Vt. 285, is a strong case illustrative of the principle. In that case it was decided that a common bill of sale excluded parol proof of a warranty. That was the sale of some hides in a package, lashed together with a rope. The proof was that the seller would not allow the package to be opened, but represented it to be a lot of good hides, and that the purchaser, upon being assured they were good, concluded to take them; and that the hides, on being opened afterwards, turned out to have been so injured at the time of sale as to be worthless. The court held that the bill of sale excluded the parol evidence to prove a warranty, and said that the evidence had no tendency to show fraud or deceit.

For both reasons the plaintiff can not recover in this case upon the ground of a warranty, *first*, because the facts reported do not amount in law to a warranty, and *secondly*, because it is not competent to add a warranty by parol evidence to the written contract.

2. The action can not be sustained on the ground of fraud. There is no finding by the referees that the defendant knew that his representations were false. For aught that appears the defendant made the representations in good faith, believing them to be true. It is urged that the report finds that the plaintiffs relied on the representations, supposing them to be true. This is necessary in all cases, in order to sustain an action for fraudulent representations; but it is not enough; it must also appear that the seller knew the representations to be false. It is insisted

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that the statement in the report that "neither of the plaintiffs had seen, or were permitted to see, the operation of the churn, except upon water," is sufficient to show fraud. It is true that if the defendant used any art or contrivance to prevent the plaintiffs from testing the truth of the defendant's representations, it would tend to show fraud, as it would tend to show that he knew his affirmations were false. But even if we could infer from this statement of the referees that the defendant resorted to some means to prevent the plaintiffs from further testing the churn, it would be but evidence of fraud, but by no means conclusive; and if the referees could not find the *scienter* with all the evidence and circumstances before them, it would be dangerous for the court to infer it from this naked general statement. It is not so strong evidence of fraud as existed in *Reed v. Wood*, above referred to, in which it appeared the seller refused to have the package of hides opened; and in that case the court say the evidence had no tendency to show fraud. In this case it is enough to say that what is found by the referees is not sufficient to constitute fraud in law, or to warrant the court in inferring fraud.

As the case shows neither a warranty nor fraud in the sale, the judgment of the county court is reversed, and judgment rendered for the defendant.

State v. Fisher.

STATE OF VERMONT v. SYLVESTER FISHER.*

Intoxicating Liquor. Evidence.

Under the law regulating the sale of intoxicating liquor, a town liquor agent is not authorized to sell such liquor, except upon an application for it for an authorized purpose, and upon a representation reasonably inducing the belief that it is wanted for such purpose only.

If the agent sell liquor without such an application and representation, and without any inquiry, or use of other means to ascertain, for what purpose it is wanted, and in fact it is procured and used for drink, and not for an authorized purpose, he is guilty of a violation of the law, as much so as if he were not agent.

In a prosecution against a town agent for the sale of liquor under such circumstances, evidence is inadmissible to prove his general reputation for prudence and caution in the discharge of his duties as agent.

COMPLAINT for selling intoxicating liquor contrary to law. Trial by jury at the December Term, 1861, PIERPOINT, J., presiding.

It was admitted that the respondent, on or about the first day of April, 1860, was duly appointed agent to sell intoxicating liquor in the town of Ripton, and was acting as such agent at the time of the sales complained of and proved on this trial.

The prosecution introduced the following testimony :

JOHN BAILEY—"I bought intoxicating liquor of the respondent four or five times, a pint at a time, and for lawful uses in all instances except two ; and in those two I bought it to drink ; in one of the two, nothing was said by Fisher about the use I intended to make of it ; in the other, Fisher asked what I wanted it for, and I replied that I wanted it to drink ; when Fisher said he did not care about people's drinking, if they did not get drunk."

MYRON PAGE—"I bought intoxicating liquor of the respondent four or five times ; the first time of Fisher's son ; don't know that he asked me what I wanted it for ; think he did not.

* This case was decided at the January Term, 1863, in Addison county, but the papers in the case were not received by the reporter in season to have it appear among the cases of that term.

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I bought at two other times, a pint at a time, and Fisher did not ask what I wanted it for, and at one time a gallon. When I bought the gallon he hesitated about letting me have so much ; I told him I wanted it to use, and did not want to be coming for a pint at a time. I don't know that he asked me in any instance what I wanted the liquor for ; think he did not ; once he asked if I was sick, and I told him I was not, but expected to be. I got the liquor every time to drink, or for men in my employ to drink. I did not get any of it for medicine, or profess to Fisher that I wanted it for medicine, and did not want it for that use, as I was in good health."

DAVID C. SHERMAN—"Got intoxicating liquor of the respondent three or four times, a pint at a time ; think Fisher did not ask either time what I wanted it for. I was in good health and did not want it for medicine, or intimate to Fisher that I wanted it for any other purpose than to drink ; did get it to drink each time. Afterwards I tried to buy two quarts, and Fisher refused to let me have it."

ARCHIBALD PLATT—"Bought of Fisher two pints of intoxicating liquor, a pint at a time. The first time he did not ask what I wanted it for, nor did I tell him ; the next time he asked if I was sick, and I replied that I was 'sick of the world.' I was in good health both times, and did not want the liquor for medicine, or so represent, but got it to drink each time."

The respondent called Bradford Ripley, who testified as follows :

"I lived with Fisher, and was present when Myron Page came for a gallon of liquor. Fisher hesitated about letting him have what he wanted ; asked me what kind of a man Page was, and requested me to talk with him. I took Page aside and talked with him. I had lived with him a good deal, and knew that there was sickness in the family. Page said he must have the liquor, that he was obliged to have it, and did not want to come for a pint at a time, as he lived some ways off. I communicated what he said to Fisher, and told the latter I thought he had better let Page have the liquor. Page did not

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profess to me or Fisher that he wanted it for medicine. I am Fisher's son-in-law."

The respondent introduced two other witnesses, who testified as to their personal knowledge of the wisdom and discretion of Fisher in making sales, and offered to prove his general reputation in the community where he lived for prudence and caution in the discharge of his duties as agent; but the court excluded the evidence, to which decision exception was taken.

The respondent also offered to show that all the witnesses on the part of the prosecution were temperate men, not addicted to intoxication; but the court rejected the evidence, to which exception was taken.

This was all the evidence in the case.

The respondent requested the court to charge the jury:

1st. That the legislature having pointed out no mode by which the agent is to ascertain whether an applicant wants liquor for legitimate purposes, the agent can not be held liable so long as he acts in good faith, though it should appear that he is careless and negligent, and does not always inquire of purchasers what their purpose is.

2nd. That an application, by a temperate householder, for small quantities of liquor, such as are commonly used in temperate families, ought not to excite any suspicion, and that the agent would be justified in supposing it to be wanted for a lawful purpose, and would not be bound to make inquiries as to the use intended to be made of the liquor, when he believes the applicant wants it for a lawful purpose.

3rd. That every presumption ought to be made in favor of the agent; that if any doubt remains, the respondent should be acquitted; and that the jury must be satisfied that the respondent intended to violate the law.

But the court declined so to charge the jury, but did charge them:

That an agent appointed to sell intoxicating liquor under the statute, is liable to prosecution if he knowingly sell it for any other uses than those pointed out and authorized by the statute, and is not protected by his license in selling for any other pur-

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pose ; that a town agent appointed for such purpose should be held strictly to an honest and faithful discharge of the trust reposed in him ; that he is bound to exercise reasonable caution and diligence to ascertain the purpose for which the liquor is designed ; that if in the exercise of such caution, he is deceived by the applicant's lying to him, or by other means he is induced to believe, and does honestly believe that the liquor is wanted for a purpose contemplated by the statute, and he sells it in good faith, he would not be liable for the penalty, even though the liquor was procured for a purpose not so contemplated ; but that if such agent sells liquor without knowing, or having any sufficient reason to believe, that it is wanted for any of the purposes allowed by the statute, and without inquiring, or resorting to any other means to ascertain, for what purpose it is wanted, he would be liable, if the liquor sold was procured and used for other purposes than those named in the statute ; that if in this case the jury were satisfied that the respondent exercised reasonable caution, and acted in good faith, he should be acquitted ; but that if, on the other hand, they were satisfied beyond a reasonable doubt that he did not exercise such caution, and sold the liquor without knowing the purpose for which it was to be used, and without any reason to believe it was to be used for any of the purposes named in the statute, and without taking any means to ascertain whether it was to be so used, or knowing it was not to be used for such purposes, and the liquor was procured and used for other purposes than those named, it would be their duty to find him guilty.

To the rulings of the court, their refusal to charge as requested, and to the charge as given, the respondent excepted.

A. P. Tupper and *J. Prout*, for the respondent.

W. F. Bascom, state's attorney, and *J. W. Stewart*, for the prosecution.

BARRETT, J. The statute, for the violation of which this prosecution was instituted, prohibits any sale or furnishing of intoxicating liquors ; with provisions by which, for certain

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specified purposes, they may be sold without incurring the penalties.

It has been decided that it is not necessary for the prosecution to prove that the respondent had not lawful authority to sell, that the fact of having such authority is matter of defence, after the fact of selling has been proved. It is obvious that, in order to constitute a defence, the necessary lawful authority implies not only the holding of the office of town agent, but that the acts complained of were such as the statute permits. It may be true that, when the fact is admitted or proved of the respondent's having such agency at the time those acts were done, the presumption would arise that they were lawfully done. But such presumption may be met by evidence tending to show that they were not done for any of the purposes permitted by the statute. If not so done, then the defence would fail, unless it should appear that the respondent acted upon warrantable grounds, and in good faith, in reference to the purposes for which the law permits him to make sales of intoxicating liquors.

Section 3 of the act of 1855 contemplates that the agent may be imposed upon by false representations, as to the purpose for which the liquor applied for is intended to be used, and guards, by penalty, against the attempt to practice it. But nowhere does the statute upon this subject countenance the idea, that the agent may sell for other than the permitted purposes, where there is not only no representation that liquors are wanted for any of those purposes, but nothing is said or done having a tendency to induce the agent to suppose so.

The fact that purchasers are respectable and temperate men, and never get intoxicated, can not bear on the purpose for which they may want to purchase liquor; for such men are as likely to want it to drink, when well, as to use it for any of the permitted purposes.

In the present case there is no evidence tending to show that any one represented, or pretended, or in any way gave the respondent to understand that the liquor was wanted for any of the purposes for which he was authorized to sell it; but the evidence tends to show that he was either directly told, or

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left reasonably to infer, that it was wanted for the purpose of drinking, and not "for medicinal, chemical or mechanical purposes *only*."

Under the structure and provisions of the statute, having reference particularly to sections 1, 3 and 5, of the act of 1852, and section 3 of No. 2, act of 1855, the true view seems to be, that it is incumbent on the agent to sell no liquor unless upon an application for it for an authorized purpose, and upon a representation reasonably inducing the belief that it is wanted for such purpose only; that if he takes upon himself to sell without such application and representation, and without any inquiry, and in fact the liquor is wanted and used for drink, and not for such lawful purpose, he would be guilty of a violation of the law, as much so as if he were not agent. If there is no such application and representation, he has nothing before him tending to constitute a case within the lawful scope of his jurisdiction as agent, and therefore should properly be left to the hazard of falling outside of the protection of the law.

This case can not properly be regarded as standing upon the same principle as some of the common law crimes, in which *guilty knowledge* is essential. The law in this case charges the agent with an affirmative duty, to sell for the specified purposes *only*; and it seeks to protect him from being imposed upon by false representations as to such purposes. If no representations are made, and nothing is done tending to impose on him a false belief, and without any inquiry, or reason for believing that the liquor is wanted for a lawful purpose, he makes a sale, he stands chargeable with a *guilty ignorance*,—a guilty negligence, which should preclude him from official protection. The principle of *Adams v. Nichols*, 1 Aik. 316, cited by counsel for the respondent, though a civil case, seems to countenance this view.

The evidence offered as to the reputation of the respondent, seems to us to have no pertinency to the case, as made by the other evidence. If there had been some evidence tending to show that the respondent had been misled, and the question had properly arisen, whether he had exercised due caution and prudence, and the requisite good faith, it might possibly have merited a different consideration.

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In thus presenting our views, it has been assumed, (though the papers furnished do not show,) that the jury found the respondent guilty for only such instances of selling as the evidence showed to be for unlawful purposes.

On the whole, we think the county court gave a charge to the jury that is sound in its law, salutary in its morality, and called for by the state of the evidence.

The defendant takes nothing by his exceptions, and the judgment is affirmed, with costs.

JOHN GLEASON v. WILLIAM H. B. OWEN.

Trover. Deed. Mortgage.

G. executed two notes, and a mortgage to secure the same, to E. & H., who transferred the notes and delivered the mortgage deed to the defendant. The defendant afterwards, but before any written assignment of the mortgage had been made to him by E. & H., sold and transferred the notes to the plaintiff, and agreed to get the mortgage deed, (which was then in the hands of another person, but subject to the defendant's order at any time,) and deliver it to the plaintiff. This the defendant afterwards refused to do. *Held*, that the plaintiff could maintain trover for the mortgage deed.

Held, also, that trover would lie notwithstanding the defendant claimed that the transaction between him and the plaintiff was a payment, and not a purchase of the notes, and that he should cancel the mortgage deed, but would not assign it.

TROVER for the alleged wrongful conversion by the defendant of a certain mortgage deed, the property of the plaintiff. The conversion was laid on the 12th of February, 1862. Plea, not guilty, and trial by the court at the September Term, 1862, KELLOGG, J., presiding.

The mortgage deed which was the subject of the action, bore date on the 5th April, 1859, and was duly executed by Michael Gleason to Melzer Edson and G. P. Hannum, to secure the

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payment of two promissory notes therein described. On the trial the notes were produced and used as evidence by the plaintiff, and the mortgage deed was produced and used as evidence by the defendant.

From evidence introduced on the trial which was not contradicted, it appeared that, on or about the 21st January, 1862, the defendant, at the suggestion of Michael Gleason, who was then indebted to him on book account to the amount of eighty dollars, purchased the said notes and mortgage deed of Edson & Hannum, with the expectation that the mortgagor would execute to him a new mortgage deed, conveying the same premises described in the mortgage deed in controversy, to secure to him the payment of his book account claim, as well as of such notes, but that such new mortgage deed was not executed by the said Michael; that on the 22nd January, 1862, the defendant commenced an action on book account in his favor against Michael Gleason, and caused the interest of said Michael in the mortgaged premises to be duly attached therein, which action had resulted in a judgment in favor of Owen against the said Michael.

It also appeared that, when the defendant purchased such mortgage notes of Edson & Hannum, the mortgage deed, by which the payment of the notes was secured, was left with A. L. Brown, Esq., for the purpose of having an assignment of the same from Edson & Hannum to the defendant written by Brown and duly executed and acknowledged by Edson & Hannum; that the assignment, which appeared to be endorsed on the mortgage deed, was accordingly written by Brown, but was not executed or acknowledged by Edson & Hannum until the 14th February, 1862; and that the mortgage notes were transferred to the defendant at the time when he purchased the same as aforesaid, and that the mortgage deed was from that time subject to his control, so that he could have had it on any day after he bought the notes as aforesaid,—but that he did not receive the mortgage deed, or have it in his actual possession, until the day when the assignment thereon was executed and acknowledged as aforesaid, and that he then received the same with the assignment thereon duly executed and acknowledged.

It also appeared that, shortly before the 12th February, 1862,

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Michael Gleason, in anticipation of proceedings on the part of the defendant to foreclose his equity of redemption in the mortgaged premises, applied to the plaintiff to assist him in arranging such mortgage debt which had been so purchased by the defendant, and that, thereupon, the plaintiff consulted his attorneys, and consented to do so by taking the notes and mortgage deeds and holding the same as security for the amount which he should furnish and pay for that purpose, and that he employed Walter C. Dunton, Esq., as counsel, and gave him the money to carry the arrangement into effect, and that the money so furnished to Dunton was the money of the plaintiff, and that no part of it was furnished by Michael Gleason; and that the interviews which Dunton had with the defendant in reference to the notes and mortgage deed, as stated in his testimony, as hereinafter mentioned, were had on the 12th February, 1862.

On the trial, Dunton was examined as a witness on the part of the plaintiff, and testified that at some time in the winter of 1861-2 the plaintiff came to him and wanted him to purchase the mortgage deed in question of the defendant, who then owned it, and then delivered to him the amount of money supposed to be due thereon; that he, the witness, thereupon went to the defendant and told him that he, the witness, had come to get that mortgage; that, as the witness thought, he did not tell the defendant at first whether he wanted to purchase the mortgage, or to pay it; that after some conversation, not material, the defendant finally said that "he had as lieves have the money as the mortgage," and thereupon computed the amount due upon the mortgage notes; that the witness then took from his pocket the money equal to the amount due on the mortgage notes, which had been furnished to him by the plaintiff, and laid the same upon the desk in the defendant's counting room, where this interview was held; that, at this interview and during this time, Michael Gleason was standing by the witness and the defendant, and the defendant wanted to have him hand the money to him, the defendant, and that, as the witness thought, Michael put his hand out and shoved the money towards the defendant; that the defendant took the money and went towards his safe with it, and said he would cancel the mortgage; that the witness thereupon

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told him not to do it, for the money and the mortgage belonged to the plaintiff in this suit; that after the witness told the defendant that he, the witness, wanted the mortgage, and that the defendant must not cancel it, the defendant said that he had not got the mortgage, but would get it and give it to the witness in a few days; that the witness then went out of the defendant's store and talked the matter over with the plaintiff, who was dissatisfied, and wanted the mortgage immediately; that thereupon the witness went back into the store and told the defendant how the plaintiff felt, and that the defendant must give him the mortgage or the money, and that the defendant refused to do either, and said that he would cancel the mortgage, and was anxious to have the receipt of the money by him treated as a payment, and not as a purchase of the notes and mortgage; that subsequently, and before this suit was commenced, the witness again saw the defendant and demanded the mortgage of him, and told him that he would be sued if he did not give it up; but that the defendant refused to do so, and wanted to treat the matter as a payment of the mortgage; and that, in doing all this, the witness was acting in behalf of the plaintiff, and as his attorney.

The plaintiff and Michael Gleason were also examined as witnesses on the part of the plaintiff, and their testimony tended to corroborate that of Dunton in respect to the material facts testified to by him.

The plaintiff further offered evidence on the trial to show that he advanced the money paid to the defendant, as above stated, upon the understanding and agreement between the plaintiff and Michael Gleason, that the plaintiff should hold the mortgage and notes above referred to, as security for the sum which he should advance thereon. The plaintiff did not claim that the defendant was privy to, or was advised of, this arrangement at any time before the notes were delivered by the defendant to Dunton. To the admission of this evidence the defendant objected, and it was excluded by the court; and to the decision of the court by which the said evidence, so offered, was excluded, as aforesaid, the plaintiff excepted.

It did not appear that the plaintiff ever, at any time, offered

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to return the mortgage notes to the defendant, or that he was requested so to do.

The defendant was examined as a witness in his own behalf, and his testimony in respect to several points was in conflict with the evidence introduced on the part of the plaintiff.

Upon the evidence and facts, above stated, the plaintiff claimed to recover nominal damages. But the court, without finding any fact, which was disputed on the trial, held and decided as matter of law, that, upon the facts found, and the evidence introduced on the part of the plaintiff, as above stated,—assuming that the facts were as claimed by the plaintiff, in respect to all points as to which the evidence of the parties was in conflict, and as the testimony on the part of the plaintiff tended to show,—the plaintiff was not entitled to recover at law; and rendered judgment in favor of the defendant. To this decision and judgment the plaintiff also excepted.

J. Prout, for the plaintiffs.

W. H. Smith, for the defendant.

POLAND, CH. J. The county court held that if all the facts were found which the plaintiff's evidence tended to prove, they did not entitle him to sustain his action of trover for the mortgage deed.

It was conceded that the defendant had become the owner of the two notes given by Michael Gleason to Edson & Hannum, and the mortgage deed executed as a security for their payment, that the notes had been delivered to him, and the mortgage deed had been handed over to Brown to write an assignment upon it, and then delivered to the defendant.

The testimony of the plaintiff tended to prove that he contracted with the defendant for the purchase of said two notes and mortgage, that he paid over the amount of the notes in money to the defendant, that the defendant delivered him the two notes, and agreed to deliver the mortgage deed, and that

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afterwards he refused to deliver the deed upon the plaintiff's demand.

The testimony on the part of the defendant is not detailed, but it is apparent that he claimed that the transaction between him and the plaintiff was not a purchase and transfer of the notes, but a payment and surrender of them, and that he became under no obligation to deliver the deed to the plaintiff.

It is first insisted by the defendant that this very dispute, and disagreement of the parties, as to the character of the transaction, and whether it was a payment or, purchase of the notes and mortgage, precludes the party from maintaining this action, by showing that his is the true version of it; that such a question can not be litigated in this form of action. In support of this objection the defendant relies on some observations made by the late Ch. J. WILLIAMS in *Pierce v. Gilson*, 9 Vt. 216. By reference to that case, it will be seen that it was an action of trover brought by the maker of a note against the payee, for refusing to surrender the note, which the maker claimed he had paid, and was entitled to have surrendered up to him. The court fully recognized the propriety of the action of trover in such a case, as being fully settled by authority, but Judge WILLIAMS, who delivered the opinion, advances the idea that the plaintiff in such an action must not only show that the note is paid, but also that it was so understood by the payee, when payment is made; that if he then claims that it is not fully paid, he has the right to retain the note in his own hands as evidence of his debt when he attempts to enforce payment of it by an action.

It seems to us that there must be very great practical difficulty in carrying out this suggestion, and holding that trover will lie to recover damages for refusing to deliver up a paid note in some cases, and not in others; depending upon the particular circumstances of how the dispute arose between the parties in relation to the fact of payment. It is hardly conceivable that such an action could ever be brought, except where the payee denied the fact of payment, and if the action would only lie where payment was conceded by the payee, there would be no occasion for bringing the action at all.

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But however it may be in such a case, directly between the parties to the instrument sued for, we think that what is said in that case has no influence upon this. Neither of the parties to this action were parties to this mortgage deed, and it was not the evidence of any debt or obligation from one to the other. It was a mere security, or the evidence of a security, for the payment of the notes, which the plaintiff claimed he had become the owner of by a purchase from the defendant. As between these parties it was merely a piece of property, which might belong to the one or the other, and whether the title and ownership of it was in the plaintiff or not, depended upon the fact whether he had purchased it from the defendant; and it seems to us there is no reason why that question may not as well be tried in this action of trover, as if it had been any other piece of personal property, a horse or a cow.

The defendant also insists that if the plaintiff had purchased and paid for this mortgage deed, and then the defendant refused to deliver it to him, the plaintiff can not maintain trover for it, because the defendant, at the time of the sale to the plaintiff, had no legal interest in it, and that by a mere parol sale to the plaintiff none was conveyed to him. It is a familiar doctrine that a mortgage is regarded merely as an incident to the mortgage debt, and a security for its payment, and that a transfer of the mortgage debt carries with it the mortgage security, without any assignment of the mortgage in writing, or even any parol agreement to assign, or any delivery.

And in such case the purchaser, and real owner of the mortgage debt, may maintain a suit in chancery in his own name to foreclose the mortgage. Still, without a formal assignment of the mortgage the legal estate is still regarded as in the original mortgagee, after the breach of condition, and such equitable assignee can not maintain an action of ejectment in his own name to recover the mortgaged premises. In this sense it is true, the legal interest in this mortgage deed was not in the defendant when he sold it to the plaintiff, nor did the plaintiff acquire it by his purchase of it by parol.

It is precisely the same as the sale of a note, or other chose in action, which is not negotiable, or if it is, is not transferred

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in the manner required to transfer the legal interest ; the holder is the real owner of it, as property, and has the sole right to collect and dispose of it, but still the legal interest is in another, so that if it becomes necessary to enforce it by an action, it must be brought in the name of the party to whom it was originally executed. Still in such action the right of the real owner will be protected, and the party in whose name the suit is brought will not be allowed to interfere, or do any act to prejudice the real owner.

In such case the real owner of the debt is regarded as having the legal interest in it, in all respects and for all purposes, except as to the mere form of prosecuting his legal remedy by action, and when he does that in the name of another, he has the same right to control and manage the suit as if in his own name.

In an indictment for stealing such an instrument, we apprehend it would be necessary to allege the property to be in the true owner, and not in the party in whom the technical right of action existed.

And so in an action of trover, when the suit is brought not to enforce the instrument itself, but for an unlawful conversion of it, as property, we think the real owner has such a title as to enable him to sue in his own name, and that a suit brought in the name of the party in whom was the technical right of action could not be sustained ; indeed the unlawful conversion might be by him, and the suit be against him. The same views here expressed will be found expressed in the case of *Fisk et al. v. Brackett*, 33 Vt. 798, and though not the precise point of decision there, were sanctioned by the court in the decision of the case.

The defendant also claims that there was no sufficient evidence of a conversion by him to enable the plaintiff to sustain this suit. The plaintiff's evidence tended to prove that he purchased the notes and mortgage, and that the defendant agreed to get the deed and deliver it to him, but that afterwards he absolutely refused to deliver it, and said he should cancel it.

As nothing more remained to be done between the parties to

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make the sale complete and perfect, except the delivery of the mortgage, the property passed without delivery, and the defendant's refusal to deliver was a conversion, if such refusal was wrongful at the time.

The cases read by the defendant's counsel, that a demand and refusal are only evidence of a conversion, and that a refusal to deliver is a conversion, only when it is in the power of a party to deliver, or he has wrongfully put it out of his power to do so, are unquestionable.

The evidence here showed that the deed was placed in Brown's hands for the defendant, and he was entitled to the possession of it at any moment he chose to take it, so that it must be regarded as virtually in the defendant's possession, and when he refused absolutely to deliver it, not upon the ground that it was not in his power to do so then, or that he wanted time to get it from Brown, but upon a denial of any right to it in the plaintiff we think it was sufficient evidence of a conversion to sustain the action.

In our view the court below erred in deciding that the plaintiff's evidence did not tend to show enough to sustain the action, and the judgment must be reversed, but as the court did not attempt to find the whole facts shown by the evidence on both sides, the case must be remanded for a new trial.

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ADMINISTRATOR OF THE ESTATE OF SILAS HUBBARD, *deceased*,
v. EDWIN S. BILLINGS.

Contract. Indemnity. Action.

The plaintiff, at the defendant's request, executed to an officer a receipt for certain property attached by him, and the defendant thereupon promised the plaintiff to indemnify him against all damage in consequence of signing such receipt, and to relieve him from all liability thereon by paying the debt, upon which the property was attached, within a few days. *Held*, that this was a contract absolutely to pay the debt, and that the plaintiff could maintain an action thereon, upon the defendant's failure to pay it within the specified term, though the plaintiff had not been obliged to pay anything upon the receipt before the commencement of his action.

ASSUMPSIT. The facts in the case, and the decision of the court below, to which exception was taken, are stated in the opinion of the court.

J. Prout, for the plaintiff.

R. Pierpoint, for the defendant.

POLAND, CH. J. The plaintiff's declaration alleges that the plaintiff's intestate, at the instance and request of the defendant, executed to Edgerton, a deputy sheriff, a receipt for certain property attached by him on a writ in favor of *Lewis v. Cooper*, and that thereupon the defendant "undertook, and then and there faithfully promised, the said plaintiff to see him harmless and indemnified from all loss, costs, trouble and expense in consequence of so receipting said property, and to relieve the said plaintiff from all liability thereon, by paying the said debt of said Lewis against said Cooper, in suit as aforesaid, within a few days thereafter, and upon which said property was attached as aforesaid."

The declaration alleges that afterwards Edgerton demanded the property so receipted of the plaintiff, and had commenced an action on the receipt. It also alleges that the defendant had not paid the debt of Cooper to Lewis, upon which said attachment was made, nor in any other way indemnified the plain-

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tiff against such receipt, but alleges no other damage to the plaintiff.

Upon the trial before the county court, the plaintiff proved the contract and undertaking of the defendant as alleged in his declaration, and it was also proved that the defendant had never paid the debt to Lewis, or otherwise indemnified the plaintiff's intestate against his liability upon the receipt.

The plaintiff's declaration does not allege that he had been compelled to pay anything by reason of his liability on said receipt, nor was it proved on the trial that any payment had been made, though subsequent to the commencement of the suit the liability had become fixed by an allowance by the commissioners against the estate of the intestate.

The county court decided as matter of law that no such damages had, at the time of the commencement of this suit, been sustained by the plaintiff's intestate, as would give him a right of action on the contract which he had proved, and the court therefore rendered judgment in favor of the defendant, to which the plaintiff excepted.

This raises the question, whether the contract of the defendant was merely to indemnify the intestate against loss or damage on account of his executing said receipt to the officer, or whether it was an absolute and independent undertaking by the defendant to pay the debt Cooper owed Lewis, as well as to indemnify.

If it was a mere contract of indemnity, then no right to sue upon it accrued until the plaintiff had suffered some loss or damage, by being compelled to make satisfaction in some way of his obligation, and his action was premature.

If it is to be regarded as an independent stipulation to pay the debt of Cooper to Lewis, and thus relieve the intestate from liability, then the contract was broken as soon as he failed to make payment as he agreed, and the action could be immediately maintained.

Upon looking into the cases which have been produced, we are all agreed that the latter construction is the true one, and that the defendant's contract was intended to be, and was, more than a mere contract of indemnity; and that it was an undertak-

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ing to relieve the plaintiff in a particular way, and within a limited time, by payment of the creditor's debt.

The grand result of all the decisions on this subject is, perhaps, as well settled by Mr. SEDGWICK as anywhere: "But when the plaintiff holds not merely an agreement to indemnify and save him harmless against the default of the other, but an express promise to pay a debt, or to do some particular act, then the position of the parties entirely changes, the relation of principal and surety disappears, and it has been held that the failure to perform the act agreed on, gives the plaintiff a right of action even before he has suffered any damage himself, and so it has been decided as a rule of pleading." Sedgwick on Damages 305.

The decisions in support of this principle seem almost innumerable, and but few of them will be referred to, as we are not aware of any judicial determinations to the contrary.

In *Holmes et al. v. Rhodes*, 1 B. & P. 638, the defendant was sued upon a bond given by him to the plaintiffs, conditioned that he would pay a debt to a third person, upon which the plaintiffs were liable as sureties for him, and also indemnify the plaintiffs against the same. The plaintiffs had not paid the debt upon which they were sureties, yet it was held that they might maintain the action and recover the full amount of the debt from the defendant, though the object of the bond was indemnity.

In a note to that case, several earlier decisions are quoted, as having settled the rule in that way in the English courts.

The same is decided in a late case in England, *Loosemore v. Radford*, 9 M. & W. 656.

In this country the decisions seem to be uniform, and the same way. In *Post v. Jackson*, 17 Johns. 239, the plaintiff, a lessee for years, underlet the premises to the defendant, and the defendant covenanted that he would pay the rent to the lessor as it became due, and upon his failure to pay, it was held that the plaintiff could recover the rent unpaid, though he had not paid it to the lessor.

In *Thomas v. Allen*, 1 Hill 145, the defendant gave the plaintiff a bond conditioned to pay the plaintiff \$800, by satisfying a bond and mortgage on certain premises which the plaintiff had conveyed to the defendant, and to save the plaintiff harmless therefrom.

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The plaintiff had not paid off the mortgage, but it was held that he was entitled to recover the amount from the defendant. It does not appear from the case how the plaintiff was under any liability to pay the bond and mortgage.

It has been held in some cases in New York, that a mere contract to indemnify against a liability, is broken as soon as a liability accrues, and before any actual damage is suffered; *Webb v. Pond*, 19 Wend. 423; *Rockefeller v. Donnelly*, 8 Cowen 623; *Chase v. Hinman*, 8 Wend. 452. But Mr. Sedgwick criticises these decisions sharply, and later decisions in New York question whether an indemnity against liability is any different from an indemnity against loss or damage; *Churchill et al v. Hunt*, 3 Denio 321; *Gilbert v. Wyman*, 1 Coms. 550. But both these cases recognize to the fullest extent the doctrine of the cases already cited. In the first, *Churchill v. Hunt*, the defendant gave a bond to the plaintiff conditioned that he would save harmless and indemnify the plaintiffs against a certain note signed by them and held by a third person, and also that he would pay or cause to be paid the said note. It was decided that the plaintiffs could recover the full amount of the note of the defendant, though they had not themselves paid it.

In this case, as in most of the previous ones cited, it is said that where the defendant contracts or covenants to do a particular thing, or pay a particular debt, he is liable to a suit as soon as he fails to do the particular thing, or make the particular payment, although the apparent object of the instrument be indemnity.

The cases above cited are quite enough to show the course of decisions on this subject, and if any further reference to cases is desired, they may be found referred to in the above cases.

In the present case, taking the facts proved in connection with the contract, it seems plain what the parties intended. The defendant purchased the property of Cooper while under attachment, and was obliged to procure a receiptor to the officer to enable him to get possession of the property. It is very probable that he agreed with Cooper on the purchase to pay the debt. The plaintiff might be willing to become responsible as receiptor if the debt could be paid, and his liability be released in a few days, when he would be unwilling and refuse to become so to

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await the issue of a long legal proceeding. Hence the contract by the defendant to release his liability in this way, and the justice of requiring him to perform it. The general object of the contract was indemnity to the plaintiff, and if the defendant had procured his discharge in any other mode than by paying the debt, as by surrendering the property to the officer, or procuring some other person to give a receipt to the officer in place of the plaintiff, or the plaintiff had neglected to enter his suit, so that the attachment was dissolved, and the plaintiff's liability ended, the defendant would have been absolved from his contract, though he had not relieved the plaintiff by payment of the debt as he agreed. But not having relieved the plaintiff in the mode he agreed, by payment of the debt, nor in any other way, he became liable as soon as there was a breach of his contract to pay the debt, and the plaintiff entitled to recover to the full extent of the debt. It is apparent enough that cases might arise, where injustice would ensue from the application of the settled rule of law, as where the defendant was liable personally for the debt, and might be again compelled to pay, after being once collected of him upon such a contract or guaranty. But if such case should arise, the defendant could only blame himself for entering into such a contract, and an opposite rule would probably more often produce injustice in the opposite direction. The justice of it in this case appears unquestionable.

The judgment of the county court is reversed, and judgment rendered for the plaintiff for the amount of the allowance against the estate of the intestate, and the lawful interest thereon.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM, 1863.

PRESENT:

HON. LUKE P. POLAND, CHIEF JUDGE,

HON. ASA O. ALDIS,
HON. JAMES BARRETT,
HON. ASAHIEL PECK,

} ASSISTANT JUDGES.

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JOHN OUMIT v. SAMUEL HENSHAW AND THOMAS THATCHER.

Duties and Liabilities of Railway Managers in respect to Baggage of Passengers. Common Carriers. Warehousemen. Custom. Baggage.

A passenger, arriving with baggage by cars at a railroad station, is justified in regarding the man who handles and takes charge of the baggage on the arrival of the train, as the agent of the railroad company which has brought the passenger there, and notice to such man while he is handling the baggage, in regard to its destination, is notice to such company.

It is the duty of a railroad company in regard to the baggage of a passenger, which has reached its final destination, to have the baggage ready, upon its arrival, for delivery, upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for it, then the company must put it in their baggage room and keep it for him, and their custody of it then is only that of warehousemen.

As regards the liability of a railroad company, as a common carrier, for baggage after its arrival at its final destination, the reasonable time, within which the owner must apply for it, is directly after its arrival, making due allowance for the delay necessarily occasioned by the crowd on the platform.

The lateness of the hour of arrival does not excuse the passenger from the duty of forthwith claiming his baggage, provided it is placed on the platform and ready for delivery, so that he can receive it.

Where railway passenger trains arrive at a late hour of the night and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting road, to put it in their baggage room, and keep it for delivery in the morning to the servants of the other road, when called for by the owner, and requested to do so, their custody of the baggage during the night is that of carriers, and not of warehousemen.

The course of business and the practice of a railroad company in respect to the custody of baggage passing over its line, and to be transferred to a connecting road, is of great importance in determining the nature of its liability therefor.

Whether a bed, pillows, bolster and bedquilts, belonging to a poor man, who is moving with his family, carried along with him in a railroad train, and packed in his trunk or box containing his clothing, are baggage or not, is a

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question to be decided by the jury, taking into consideration the particular circumstances of the case, and the use, quality, value and kind of the articles in question.

CASE against the defendants as common carriers over the railroad known as the Rutland and Burlington railroad, for the loss of a box, containing divers articles of personal property belonging to the plaintiff, which, as the plaintiff alleged, was delivered to the defendants to carry, as his baggage, from Burlington to Rutland, on the 14th March, 1859. Plea, not guilty, and trial by jury at the June Term, 1860, KELLOGG, J., presiding.

On trial, it was admitted by the defendants that, at the time of the alleged delivery and loss, they were, as trustees under the second mortgage of the Rutland and Burlington railroad, in possession of such railroad, and were running or operating the same as carriers of passengers and freight for hire.

The plaintiff, in support of his action, testified in substance:— that on the 15th March, 1859, he, with his wife, left Canada to come to East Dorset, Vermont; that he brought with him from Canada a box between three feet and three and one-half feet long, two and one-half feet high, and twenty-two inches wide, as his baggage, containing the articles described in his declaration; that in addition to various articles admitted by the defendants to be baggage, this box contained a feather bed, some pillows, a bolster and some bedquilts which belonged to the plaintiff and had been used in his family, and which, as he was changing his place of residence from Canada to East Dorset, he carried with him on this occasion; that he arrived at Burlington in the evening of March 15th by cars, and there saw his box taken off from the cars of the train on which he came, and placed on the platform at the place where the cars stopped, and that he went into an office and there purchased tickets for the passage of himself and his wife in the cars over the railroad from Burlington to Rutland; that at Burlington a man put his box on the cars for Rutland, who was at work on the platform where the cars for Rutland started from, handling other boxes and trunks, and loading them on to the cars of the train for Rutland; and that when the man loaded the box on the cars for Rutland, he asked

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the plaintiff where he, the plaintiff, was going to, and the plaintiff replied that he was going to Rutland, and the man then took a piece of white chalk and marked the end of the box with it, and the box was put on the cars for Rutland, and the plaintiff and his wife came from Burlington to Rutland in the cars of the same train, and arrived at Rutland about half-past 11 o'clock in the same night ; that, on arriving at Rutland, he, the plaintiff, got out of the cars on to the platform in the railroad depot at that place, and there saw his box taken out of the baggage car and put on the platform, and saw the man who handled and took charge of the baggage there, take the box and put it with other boxes and trunks on to a wheelbarrow ; that he asked the same man at what time the cars would go to East Dorset in the morning, and was told by him that they would start at half-past five o'clock ; and that he then asked the same man if his box would be safe until morning, and was informed by him in reply that it would be safe ; and that he saw the same man start with the wheelbarrow, on which his box was placed, and go to a room at the corner of the depot, and put it in there, and supposed that he locked up the room ; that early the next morning, and before the time of the starting of the cars from Rutland to East Dorset, he, the plaintiff, called on the same man for the box, and both went into the same room where it was put the night before, but it could not be found, and that the man said that he guessed he had sent the box on the four o'clock train which went from Rutland to the eastward on that morning, along with a party of French people who came with the plaintiff from Burlington to Rutland, and were going to Worcester, Massachusetts ; and that the plaintiff has never since found his box, or been able to obtain any information about it.

It appeared that the plaintiff purchased his ticket at Burlington for a passage on the regular passenger train from that place to Rutland, and that such passenger trains did not take freight, but only transported passengers with their baggage ; and, also, that the plaintiff was intending to go to East Dorset, a station on the line of the Western Vermont railroad, the line of which connects with the line of the Rutland and Burlington railroad, at Rutland, and that he did not intend to go any further than Rut-

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land on the Rutland and Burlington railroad, and that the said two last named railroads were under separate and distinct management, and no evidence was given tending to show that there was any business connection between them.

The plaintiff also testified in regard to the articles contained in his box, and their value ; and also introduced the testimony of other witnesses tending to support and sustain his own testimony as above mentioned.

The defendants' counsel claimed, and requested the court to rule, as a conclusion of law on the evidence on the part of the plaintiff, as above detailed, that as Rutland was the place which the plaintiff had indicated and directed as the place of the destination of the box when it was received on the cars at Burlington, and as the box was carried on the cars from Burlington to Rutland, and was taken from the cars and deposited on the platform in the depot at Rutland, and there seen by the plaintiff, the defendants were under no further liability for the box and its contents as common carriers, and that the evidence on the part of the plaintiff was not sufficient, *prima facie*, to establish a cause of action against the defendants under the declaration in this case ; but the court declined so to rule. To the refusal of the court so to rule the defendants excepted.

The defendants then introduced testimony tending to show that the plaintiff's box was never delivered to them, or received on their cars at Burlington, or any other place, and that, if lost at all, it was probably lost at Burlington, or before it reached that place.

The defendants' counsel requested the court to charge the jury that, in case they should find that the defendants were liable for the baggage of the plaintiff, that liability would not extend to articles of furniture, or to such articles as feather beds, bed quilts, pillows and bolsters, which were included in the contents of said box, as claimed by the plaintiff in his declaration. The court declined so to charge the jury as requested.

Among other things not excepted to, the court charged the jury that the carrying of the baggage of passengers is included in the principal contract for his own conveyance, and the carrier is to be held responsible for the loss of the baggage, although

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there was no separate contract concerning it; that if the jury should find from the evidence that the plaintiff purchased tickets at the office of the defendants in Burlington, for the fare of himself and his wife in the cars over the railroad from Burlington to Rutland, and informed the servant of the defendants at the station at Burlington, whose business it was to take charge of the baggage delivered there for conveyance on the cars of the defendants, that he was going to Rutland, and delivered to him the box, described in the declaration, to be forwarded to Rutland as his baggage, and the said box was received and put on the cars as his baggage, to be carried to Rutland, as the testimony of the plaintiff tended to show, in that case the defendants are to be considered as taking upon themselves the obligation not only to transport the box to Rutland, but also to deliver the same to the plaintiff, at the usual place of delivery at that station, if called for by him within a reasonable time after the termination of the journey; but that if the box was not called for by the plaintiff within a reasonable time after its arrival at Rutland, the liability of the defendants for it, in the character of common carriers, would cease, and they would, thenceforth, hold it as mere gratuitous bailees or keepers in deposit, and, for its loss in that case, the plaintiff would not be entitled to recover against the defendants in this action; that the depositing of the box on the platform in the depot at Rutland, on its arrival at that station, coupled with the fact that it was seen there by the plaintiff, and that the plaintiff might then have called for and taken the charge and control of it, would not be such a delivery of the box to the plaintiff as was necessary to the complete performance of the duty of the defendants as common carriers in respect to the same, if the defendants or their servants retained any custody or control of it: and that it was necessary, in order to have completed such a delivery that the defendants, or their servants having the charge of the box, should have parted with the control and custody of it, and transferred its actual possession to the plaintiff; and that the question whether the box was called for by the plaintiff within a reasonable time after his arrival at Rutland, was one of fact, to be determined by the jury, on a consideration

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of the testimony given in the case bearing on that point; that the defendants, as common carriers, were liable for only such articles, contained in the box, as were articles of reasonable and ordinary baggage, such as were articles of necessity or convenience, for personal use, and such persons traveling usually carry with them; that, although in a given case it might be a mixed question of law and fact, as to what should be deemed articles of baggage, as distinguished from articles of merchandize, yet there was no definite rule of law which the court could lay down, by which the character of any particular article, in this respect could be defined or determined with precision or certainty, as the same article might properly be treated at one time as baggage, and at another as merchandize, and the decision of the question, whether baggage or merchandize, might depend on, and vary with, the particular circumstances of each case; that whether any particular article should be considered as baggage, or as merchandize, might be unimportant, if it was received as baggage, and there was no attempt to conceal its character, and nothing in its bulk or value which would be objectionable as imposing on the carrier an increased measure of responsibility or care; that, under particular circumstances, a bed might be deemed a proper article of baggage; and that, in regard to the articles mentioned in the plaintiff's declaration, and claimed by him as articles of baggage, it was a question for the jury to decide as to what were, or were not proper articles of baggage, under the particular circumstances of the case as established by the testimony, and that, in determining this question, the jury should consider the uses, quality, value and kind of articles which were claimed as baggage, and their connection with the ordinary purposes of traveling.

The defendants excepted to the refusal of the court to charge the jury as they had requested, and also to the charge given by the court to the jury, in the particulars above mentioned.

The jury returned a verdict in favor of the plaintiff for \$66.31 cents damages.

E. J. Phelps, for the defendants.

A. L. and H. E. Miner, for the plaintiff.

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ALDIS, J. The action is case against the defendants, as carriers. There is no count against them for negligence as warehousemen.

The plaintiff was going by railway from Burlington to East Dorset. From Burlington to Rutland he would go by the Rutland and Burlington Railroad, (the defendant's company ;) from Rutland to East Dorset, by the Western Vermont Railroad. It does not appear that these roads formed a continuous and connected line. The plaintiff had his box marked for Rutland, and paid for his passage only to Rutland. He arrived at Rutland at half past eleven at night. His box was put upon the platform, and the man who handled and took charge of the baggage there, put the box, with other boxes and trunks, on a wheelbarrow. The plaintiff asked the man, at what hour the cars would go to East Dorset in the morning. He replied,—“at half-past five o'clock.” The plaintiff then asked the man if his box would be safe till morning. The reply was,—“it would be safe.” The man then started with the wheelbarrow, and went to a baggage room in the depot, into which he put the box, and other baggage, and locked up the room. In the morning, at about five o'clock, the plaintiff called for his box, and it could not be found; the baggage master saying that it had probably been taken on the four o'clock train that had left Rutland that morning for Bellows Falls.

I. We think the plaintiff had the right to regard “the man who handled and took charge of the baggage,” on its arrival at Rutland, as the servant of the Rutland and Burlington Railroad Company, and acting in the discharge of his proper duties. The conversation between the plaintiff and “the man,” (whom he had the right to regard as the baggage master of the station,) gave the latter reasonable notice that the box was going on to East Dorset by the next train on the Western Vermont railroad. The inquiries were such as travellers desiring to go further usually make, and which the baggage master must have fully understood, without any more formal or explicit statement. Having the charge of the baggage at this point, notice to him in regard to its destination was notice to the company, because it was a notice to him

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of a matter within the proper sphere of his duties as their servant. He could have required the plaintiff to take the delivery of it. He could have told him that he must find the servants of the Western Vermont Railroad Company, and deliver the box to them. Instead of so doing, he, voluntarily, and with the knowledge that the box was to go on by the next Western Vermont train, took the control and custody of the box himself, and put it in the defendant's baggage room. His act, whatever is the legal effect of it, must be regarded as the act of the Rutland and Burlington Railroad Company; *Jordan v. The Fall River Railroad Company*, 5 Cush. 69; *Redfield on Railways*, p. 243.

2. The defendants insisted and requested the court to charge the jury, that the putting of the box on the platform at Rutland, ready for delivery, where it was seen by the plaintiff, and might have been taken by him, was a complete performance of their duty as carriers; and that if the baggage master thereupon retained the custody of it, with the consent of the owner, and put it into the baggage room of the depot for safe keeping till morning, the company were only liable as warehousemen for such keeping till morning.

The court charged, first, that it was the duty of the company to carry the box to Rutland, (its destination,) and there deliver it to the plaintiff, if called for by him within a reasonable time after the termination of the journey; but if it was not called for within a reasonable time after its arrival, the liability of the defendants as carriers would cease; and thereafter they would only be liable as bailees, and not as carriers; and that the question whether the box was called for within a reasonable time was one of fact, to be determined by the jury upon the testimony: secondly, that the depositing the box on the platform in the depot at Rutland, and its being seen there by the plaintiff, who might then have called for and taken it, was not a delivery, nor the complete performance of the defendants' duty as carriers, so long as the defendants or their servants retained any custody of it; and that in order to have completed a delivery, the defendants' servants should have parted with all custody of the box, and transferred its actual possession to the plaintiff.

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This is all of the charge upon the point whether the facts shown would discharge the defendants from their liability as carriers.

The important question in this case is, whether the delivery of the box upon the platform of the depot at Rutland, (which was its place of destination,) in the sight of the plaintiff, at half past eleven at night, and its removal by the defendants to their baggage room for keeping through the night, they being informed that it was going over the Western Vermont road to East Dorset by the first train in the morning, the plaintiff inquiring if it would be safe there, and they assuring him that it would,—whether these facts release the defendants from liability as carriers for the box during the night, and make them liable only as warehousemen?

This case is of but slight pecuniary importance, but the question involved is of much importance to the public and the railway companies; and fully justifies the defendants in the diligence and research which they have bestowed upon its investigation, and in their desire to have its decision establish the rule in regard to similar cases.

It is admitted that the plaintiff bought a ticket at Burlington for Rutland, and had his box marked for Rutland, and that in going to his final destination of East Dorset, he could go no further than Rutland on the Rutland and Burlington Railroad. He did not even tell the station agent at Burlington who marked his box that either he or it was going further than Rutland. Rutland therefore was, so far as the defendants could know, his final destination, until he arrived there.

When he arrived there his box was placed upon the platform, at the usual place of delivery, ready for delivery to him. He saw the box, and could have demanded that its custody should be given up to him. He did not demand it. The baggage master did not offer to deliver it up to him, or require or request him to take it.

Now upon these facts standing alone, and without reference to what further was said and done about going on in the morning to East Dorset, let us consider what would be the rule of law, as to delivery and future custody by the railroad company.

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We think it is the true rule of the law as to baggage that has reached its final destination, that the railroad company must, upon its arrival, have it ready for delivery upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and that the owner must call for it within a reasonable time, and must use diligence in calling for and removing it. If the owner does not within a reasonable time, and in the exercise of diligence, call for the baggage, then the company should put it in their baggage room and keep it for him, and their custody of it then is only that of warehousemen; and they are discharged from liability as carriers as soon as they have kept it ready for delivery a reasonable time, and it has not been called for. Where trains arrive at such hours that it is the usual course of business at the station to immediately deliver the baggage, and for passengers to immediately receive it, there the reasonable time for which the company should have it ready for delivery, must be limited and governed by the practice and custom of immediate delivery; and in such cases reasonable time and immediate delivery go hand in hand, and "reasonable time" can not extend the delivery to another day or another occasion. We believe it to be the usual custom to deliver and receive baggage not only during what is called the business hours of the day, but upon the arrival of trains in the night, and at almost any hour of the night. The traveller is rarely willing, after arriving at his destination, to leave his baggage at a railroad depot, and the railway companies are usually desirous to despatch business, and be relieved from their responsibility. Hence immediate delivery is the rule as to baggage; and the rule that has been applied to the receipt of freight, that it should arrive during the usual hours of business, and so that the consignee may have an opportunity during the hours of business to see and receive it, does not apply to baggage, which usually accompanies the traveller, and is required by him on arrival.

The rule is thus expressed by Mr. ANGELL, in his work on the law of carriers, sec. 114: "The arrival with the baggage in safety at the place of destination, will not discharge the carrier until its delivery to the owner; although, unless demanded in a

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reasonable time, the liability of the carrier, in his strict character of a common carrier, will not continue. No passenger is required, however, to expose his person in a crowd, or endanger his safety in the attempt to designate and claim his baggage."

In *Pierce on Railroad Law*, p. 499, it is said: "the liability of the company as a common carrier ceases when the passenger has had a reasonable opportunity after the arrival to receive his baggage; if it remains in its custody after that, the company will be liable only as bailee for hire or gratuitously, according to circumstances."

Redfield on Railways, speaking of the liability of railroad companies for the baggage of travellers, says: "they remain liable until a full and unequivocal re-delivery to the owner, and ordinarily to the end of the route;" and in a note, citing *Powell v. Myers*, says: "if baggage be not called for in a reasonable time, the liability of the company as carriers ceases, and they are holden only for ordinary care as bailees for hire."

The case of *The Norway Plains Company v. The B. & M. R. Co.*, 1 Gray 293, has been cited as an authority of great weight to establish the doctrine that delivery of goods, and, by analogy, of baggage, upon the platform, discharges the railway companies from liability as carriers. The point upon which that decision has since been much questioned, that even where the owner of the goods has no opportunity to receive them, in the exercise of all reasonable diligence, the company is only liable as bailee for hire, does not seem to arise in this case. For here the owner had the opportunity to remove his baggage. And we incline to think the learned court of Massachusetts, in applying the doctrine of that case to the baggage of travellers, would hardly say, that, if the passenger, on the arrival of the train, on the spot and at the time used due diligence to get his baggage, and it was lost or stolen while on the platform and before he could get it, the company would not be liable as carriers.

If the doctrine of that case were to be pressed so far as to claim, that, if the railroad companies, for their own convenience and the dispatch of business, put the baggage of travellers into their baggage room, and there kept it till it was convenient for

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them to deliver it, they would not be liable as carriers, we should feel obliged to differ from such a rule.

It is the very point upon which the decision is open to criticism, upon which the supreme court of New Hampshire, in a more recent case, (32 N. H. 523,) upon the same facts, has decided directly to the contrary, and in which it is distinguishable from the cases in the 8 Taunton and the 4 T. R. 581, which are cited to sustain it. Those cases stand upon the ground that, after the goods have reached their destination, and when the carrier holds them for the benefit of, or upon an agreement with, the owner, or after a reasonable time for delivery has expired, or for the convenience of the owner, there the custody is as bailee, and not as carrier.

The rule of law, as to the liability of carriers for the baggage of travellers which has reached its destination, we have already stated; and we are satisfied that the reports, as well as the text of elementary writers, will fully sustain the rule as here expressed. We think, therefore, that as the plaintiff's box was ready for delivery on the platform, and he might have received it and had it removed to a hotel, the lateness of the hour at which the train arrived will not of itself extend the reasonable time within which the plaintiff should call for it to the next morning, so that, it not being called for, the defendants became liable for its custody as carriers. If it was not the usual course of business for the defendants to deliver baggage immediately on the arrival of the train at that late hour of night, or if the railroad company detained the plaintiff's baggage for their own convenience upon the arrival of that train, such facts should have been shown by the plaintiff; and if shown, might vary the defendant's liability for the custody of the property. But we can not presume such facts to exist, and without them the case must stand upon the usual custom of business, and the ordinary rules of law applicable to such state of facts.

Thus far we have considered the case upon the basis that Rutland was the final destination, and nothing further said or done between the parties.

But the case shows that the plaintiff informed the baggage

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master that the box was going on in the morning by the Western Vermont road to East Dorset, and that the baggage master, with such knowledge, took the box to the baggage room, the plaintiff consenting, or rather not objecting.

It does not appear that the Rutland and Burlington and the Western Vermont roads formed a continuous line, or were connected in business—both, however, using and starting from the same depot.

The question then arises, whether, when baggage arrives at its destination upon one railroad, and is then to be transferred to the other road that connects with it at that point, and the former road on the arrival of the train has knowledge of the fact that such baggage is to go on by the next train in the morning, over the other road, and with this knowledge stores the baggage in its baggage room till morning,—the owner not objecting,—is the custody of the baggage during the night that of carrier or warehouseman?

This we think must depend upon what is the usual course of business—the usual practice of the company as to the delivery of baggage that is going on over another road.

Where two connecting roads meet, and their trains start from the same station or depot, and the traveller and his baggage are going directly on, the baggage merely to be removed from the car in which it has been brought to another on the connecting road, there by necessity new duties spring up. The traveller is in no situation to receive his baggage and to deliver it to the other road. He may be, and generally is, ignorant of the places where the trains are placed, and of the means of transfer for his baggage. He is not unfrequently surrounded by a crowd as ignorant as himself; is confused by the presence of several trains and by what appears to him like the disorderly movements of engines, cars and baggage, and from the delays incident to such crowds and places is often hurried for time to get his ticket and his seat. He can not substitute his own care and custody of his baggage for that of the railroad company. To attempt it would be but to produce delay and confusion, and an intermeddling which the railroad companies could not endure. Hence at such junctions of connecting roads the railroad companies frequently,

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perhaps we may say usually, provide persons to transfer the baggage from one road to another. If the baggage of the traveller is not marked or checked for any point beyond such junction, all they expect of him is that he shall point out his baggage and state the road over which it is to go, and be present when it is delivered to such road to direct at what station it is to be left, that it may be properly checked or marked. The companies assume the control and custody of it in transferring it from one road to another—the servants of the first company delivering it to the servants of the other. Where it thus becomes the usual course for the first company to deliver baggage going on over another road to the servants of such other road, it is obvious that the custody of the first as carriers continues till the custody of the second begins. The traveller has the right to rely on this usual course of transferring and delivering baggage, and can require the delivery of his baggage according to such usual practice. It is the place where he is the most helpless, and where baggage is the most likely to be lost or stolen—where fraud, collusion and theft are the most easily practised. On the other hand, it is indispensable for the convenience of such connecting roads, for the prevention of confusion and delay and for the dispatch of business, that they should assume such custody and transfer of baggage, and in such custody the security of the public requires that they should be held as carriers.

So if the second train does not directly connect and leave on the arrival of the first, and there is a detention at the station for a short period of time or even for a few hours, the custody of the railroad company thus assumed must be held to continue till the expected train departs, or the servants of the second company take the delivery of the baggage; the usual course of business determining their liabilities in this respect. Nor ought the relation of carrier to be changed by either company's putting the baggage into a store-room for safety while waiting for the departure of the next train.

So where trains arrive at a late hour of the night and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting

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road, to put it in their baggage room and keep it for delivery in the morning to the servants of the other road when called for by the owner and requested to do so, then their usual practice as to the delivery of such baggage should govern, and the custody during the night should be that of carrier and not warehousemen. The traveller has the right to call for such delivery in the morning according to the usual practice. The danger of collusive theft from the baggage-room during the night is as great as at any point of the carriage; the traveller relying on such practice has no custody of his property and cannot substitute his own watchfulness for that of the company; and the latter by adopting the practice lead the public to rely on their vigilance and care. That the course of business—the practice of the carrier—is a most important element in determining when the transit ends. will appear from an examination of the leading case of *The F. & M. Bank v. The Champlain Transportation Co.*, 23 Vt. 211. Judge REDFIELD in delivering the opinion of the court says:—“All the cases almost without exception regard the question of time and place when the duty of the carrier ends, as one of contract to be determined by the jury from a consideration of all that was said by either party at the time of the delivery of the parcels to the carrier; the course of the business, the practice of the carrier and all other attending circumstances.” To hold that delivery by railroad companies of baggage on the platform is delivery to the owner, and by an absolute and inflexible rule of law terminates the transit and discharges the carrier as such from further responsibility—irrespective of their own practice and course of business as to delivery—would we think be in conflict with the principle of the decision in the case last alluded to.

The case of *Powell v. Myers*, 26 Wend. 591, is in many respects similar to the case at bar and is so much in point—especially as showing that the course of business as to the delivery of baggage may justly be relied on by the traveller—that we deem it proper to refer to it with some particularity.

The plaintiff's trunk was put on board the defendants steamboat at West Point for New York, where it arrived between nine and ten at night. Passengers occasionally staid on board

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during the night, but usually left the boat on arriving at the city. Shortly before arriving at the dock the plaintiff asked the master of the boat if his baggage would be safe on board the boat during the night. The master replied that it would be perfectly safe, for they stationed a watch for its protection till morning. The plaintiff left his baggage on the boat but went off to the city himself. During the night a negro with a forged order came for the baggage and obtained it. Chancellor Walworth in delivering the opinion says:—"The jury were right in concluding that the baggage left on board was in the custody of the master, in his capacity of common carrier, until it was called for at the usual time in the morning after its arrival at its place of destination." And Verplanck, Senator, says: "The passenger's trunk left in the boat till a convenient and usual time of delivery is governed by the same law with the merchandise transported in the boat. Mere arrival does not discharge the carrier's responsibility as to either."

The English decisions recognize the same doctrine. Thus where there is a usage for the porters of the company to put the baggage on a cab or a hackney coach, there it is held there is no delivery to the traveller till that is done, though the porter take the baggage from the hands of the traveller, while standing on the platform, to put upon the cab.

Richards v. The L. & S. C. R. Co., 7 C. B. (62 E. C. L.) 839; *Butcher v. The L. & S. W. R. Co.*, 29 Eng. L. & E. 847; *Bromley v. The Midland R. Co.*, 33 Eng. L. & E. 235.

The court did not put the case on this ground, which upon the evidence it might perhaps have been. The law of the charge is right, but is inapplicable to the case. Upon that charge we cannot tell upon what ground the jury may have held that the box was called for in a reasonable time. It might have been merely because it arrived at a late hour.

The court should have charged as to the law as applicable to baggage going on over the Western Vermont road and deliverable according to the course of business of the defendants and kept by them for such delivery.

It is denied that in the case at bar there was evidence to show, that it was the usual course of the defendants, on being informed

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at night that baggage was going on over the Western Vermont road, to deposit it in their store-room and there keep it over night for delivery in the morning, when the owner should call for it, to the servants of the other company; and that the court in their charge in substance directed the jury that if they found these facts then the defendants would be liable as carriers. But we think we could not be justified in so construing the charge. The part of the charge which speaks of the reasonable time within which baggage should be called for, would have to be extended by implication quite beyond what jurymen would have understood from it in order to embrace this idea.

It is said also that the conduct and language of the baggage master gave the plaintiff to understand that it was the practice of the company to keep such baggage over night for delivery in the morning to the Western Vermont road when called for by the owner, and that in this respect the case falls within the decision of *Powell v. Myers*. Unquestionably, if a servant of the company acting within his duties—the baggage master for instance—had assured the plaintiff that it was their custom to keep baggage for delivery, when called for, to the other company in the morning, such an assurance would bind the company, if the plaintiff had relied upon it and left it with them upon such assurance. But nothing of this kind was stated in the charge to the jury, nor can we know what would have been their finding on the point; nor whether they would have held what the baggage master said and did, as amounting to a declaration of their practice upon which the plaintiff would have been justified in relying.

The court seems to have treated the case as that of baggage which had reached its destination, and upon that basis to have left it for the jury to say whether it was called for within a reasonable time, when in fact the plaintiff was present, saw his baggage, had an opportunity to take it into his own custody, and could with due diligence have removed it. This we think was error. The other branch of the case now sought to be established, that the baggage was going on in the next train over the Western Vermont road; that the defendants knew it; that it was their custom to put such baggage in their baggage-room and

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keep it till morning for delivery to the servants of the Western Vermont road when called for by the owner; and also that the conduct and language of the servant of the defendants led the plaintiff to understand that there was such a custom, and to rely on it even if there was not—does not appear to have been suggested to the jury as furnishing a reasonable ground for holding the defendants liable as carriers for its delivery in the morning.

If such a course of business as to the custody and delivery of such baggage had been shown, the plaintiff would have been entitled, by giving the company such notice, to require of them to deliver the baggage in the morning to the Western Vermont road pursuant to such custom when called for. If he did not call for it in the morning at the usual hour for the delivery of such baggage, then their custody as carriers would cease and thenceforth they would only be bailees for him.

II. A bed, pillows, bolster and bedquilts belonging to a poor man, who is moving with his wife and family, may properly be called baggage. It is very common for such persons to take such articles with them as baggage—their poverty makes it necessary, and such things are frequently about all they have that would make baggage. They are not merchandise—are of small value—may be put in a box or trunk like apparel—are frequently of immediate and necessary personal use to the owners, and both from custom, and from a regard to the poverty of such travellers, are often and properly treated as baggage. If the tools of a mechanic (14 Penn. 129), or articles of amusement such as a gun, a pistol and fishing tackle, or of instruction as books (6 Hill 590), or a lady's jewelry, are properly baggage because they are usually carried as such, we think the articles here in question may both by reason and custom be included in the same list. The case on this point was we think put to the jury with proper instructions.

Judgment reversed.

Crosby v. School District.

A. C. CROSBY v. SCHOOL DISTRICT No. 9 IN READSBORO,
*Appellant.**School. School Register. Forfeiture.*

The certificate of qualification, which teachers of common schools are required to obtain from the town superintendent, need not contain any statement in reference to their good moral character.

A teacher of a common school does not forfeit his wages by reason of his neglect to answer the inquiries to teachers contained in the school register, and to certify to the correctness of his record of the daily attendance of the scholars. BARRETT, J., *dissenting*.

But if, in consequence of such neglect, the school district loses a portion of the public money, the teacher must make good such loss to the district.

ASSUMPSIT. Plea the general issue, and trial by the court, at the December Term, 1861, KELLOGG, J., presiding.

On the trial before the county court the parties agreed upon the following facts, viz : The plaintiff's minor daughter, Alletha J. Crosby, taught school in said district from the 3rd day of May, 1859, to the 22nd day of July, 1859, at the price of one dollar and fifty cents per week, under a contract made by the plaintiff with the defendant. At the time she commenced such school she had in her possession a certificate signed by the superintendent of common schools for the town of Readsboro, in the following words :

"This may certify that Miss Alletha J. Crosby has this day been examined in the common English branches of education, and found qualified to teach the same, and is therefore licensed to teach school in the town of Readsboro, for the term of one year. Readsboro, May 2nd, 1859."

The plaintiff's daughter was furnished by the clerk of the district with a school register, as required by the statute, before she commenced the school. She kept in the register a record of the daily attendance of her scholars, but she neglected to enter in the register any answer to but one of the thirty-four statistical interrogatories therein addressed to teachers, or to make any certificate of the correctness of the record of the attendance, tardiness and deportment of the scholars attending her school,

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or of the correctness of her answer to any of the statistical interrogatories as required by the register.

In consequence of such neglect the district lost of their public money for that term of school the amount of four dollars and fifty cents.

The plaintiff never received any pay for his daughter's services, as such teacher.

The plaintiff objected to the reception of such agreement, or of any evidence, in respect to the loss of public money by the district through the neglect of the teacher, as irrelevant to the issue, and the court *pro forma* sustained the objection, to which the defendant excepted.

The defendant objected to the certificate of the town superintendent, but the objection was *pro forma* overruled by the court, to which the defendant excepted.

Upon these facts the court rendered judgment *pro forma* for the plaintiff for eighteen dollars, being the amount due to the plaintiff under such contract, and interest thereon since July 22nd, 1859, and costs, to which the defendant excepted.

W. H. Follett, for the defendant.

A. W. Preston and A. B. Gardner, for the plaintiff.

ALDIS, J. I. The 8th section of chap. 20, p. 143 Comp. Stat. requires the town superintendent to *obtain full and satisfactory evidence* of the good moral character of school-teachers; and to ascertain by *personal examination* their qualifications to instruct and govern a school; and to give them certificates of *their qualifications*. The statute distinguishes between good moral character and qualifications to teach school. The first the superintendent is to ascertain by inquiry, the second by personal examination, and to this he is to certify. The certificate fully complies with the statute.

II. The Act of 1858, sec. 6, provides that the public money shall be divided among the districts according to the average daily attendance of the scholars, instead of the number of scholars between four and eighteen years of age. Sections 7 and 8

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provide for the furnishing of a school register in which the teacher shall "keep a true record of the daily attendance of each scholar, and at the close of his school shall enter in the register correct answers to all inquiries therein addressed to teachers, and shall return such register to the district clerk previous to the receipt of his wages as teacher." The district clerk is to file the register with the town clerk with certain returns verified by his oath; and no portion of the public money shall be distributed to a district whose register is not properly filled out.

In this case the teacher kept a record of the daily attendance of her scholars; but she did not answer the interrogatories addressed to teachers, nor certify as to the correctness of her record of attendance as required. It would seem that her record is imperfect or inaccurate in some respects. In consequence of her neglect the district lost \$4.50 of public money, which they otherwise would have had. The district claims that for such neglect she forfeits all right to wages by virtue of the clause in the 8th section, which enumerates her duties and closes by saying, "and return such register to the district clerk previous to the receipt of his wages as such teacher." The duties, imposed on teachers by that section of the act are, very important. The record of attendance is the basis for the distribution of the public money, and the answers to the statistical inquiries embody facts important for ascertaining the practical working and utility of our school system and for the improvement of our schools.

We think however that it was not the intention of the Legislature to secure the performance of these duties by subjecting the teacher to a forfeiture of wages for non-performance of these duties. The statute is rather directory—pointing out with minuteness the duties to be done and the manner and time of doing them. The thirty-four inquiries require very great minuteness and accuracy in matters of detail connected with the school and the district. If the clause we have above quoted, works a forfeiture of wages, any one omission or neglect in these matters would produce this result. This seems to us a more harsh and severe penalty than the law could have intended to visit upon negligence even in such matters. We think the Legislature

intended to rely for the faithful performance of these duties—first, upon clearly specifying to the teacher what was to be done, and secondly, by securing through the presumed fidelity and good intent of the teacher, and through the examinations, visits, vigilance and zeal of the superintendents, prudential committees and visitors, a zealous and diligent attendance to these duties.

It is observed too, that no language is used expressly providing for a *forfeiture* of wages; and it seems to us that so serious a penalty likely to be visited upon many young persons throughout the state for slight failures and neglects, would not have been enacted without plain and express words declaring a forfeiture.

It seems just and reasonable, however, and one of the instruments for securing the faithful working of the system, that the teacher should be liable to make good to the district the amount of the public money which the neglect of the teacher causes the town to lose.

As the county court allowed the teacher the whole amount of her wages without deducting for the \$4,50, we reverse the judgment and render judgment for the plaintiff for the eighteen dollars deducting therefrom the \$4,50 and interest on it to the December term, 1861, and allowing interest on the balance to this date.

BARRETT J., dissenting. As I regard the decision to be in direct contravention of a plain statute, rendering nugatory an important provision, and also of well established principles of the common law, and calculated to result in consequences seriously detrimental to the educational system of public schools in the state, as it is constituted by legislative enactment, I deem it my duty to make public the grounds of my dissent, to the end that the decision shall have no further sanction than it derives from the concurrence of the Judges who really made it.

In 1856 the Board of Education was constituted, and its purposes and duties defined. As an important branch of that board, a *Secretary* was also provided, whose duty, among other things, is "to visit schools, &c., and furnish and distribute to them blank forms for collecting statistics of the various schools

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in the State. He shall prepare and present to the Board of Education, on the first day of their annual session, a report of his official doings for the preceding year, and a statement of the condition of the common schools of the State," &c.

By section 8, of the act of 1858, relating to common schools, "It is made the duty of every teacher of a common school, before he commences his school, to procure from the clerk of the district, in which he shall teach, a school register, and therein keep a true record of the daily attendance of each scholar who may attend such school, while under his instruction, in accordance with the form prescribed in such register, and, at the close of his school, shall enter into said register correct answers to all statistical inquiries therein addressed to teachers, and return such register to the district clerk, *previous to the receipt of his wages as such teacher,*" &c.

By sec. 6, it is provided, that the public money is to be divided "between the districts in town in proportion to the average daily attendance of the scholars of such districts upon the common schools of such districts during the preceding school year. Such average daily attendance to be ascertained from the record thereof to be kept in the registers of such schools prescribed in this act."

By the last clause of section 8, it is enacted, that "no portion of the public money in any town shall be distributed to any district, whose school register or registers shall not be properly filled out and filed in the town clerk's office, pursuant to the provisions of this act."

Said 8th section requires the performance of the prescribed duty, in respect to the keeping, certifying and return to the clerk of the district, of the register, *previous to the receipt of the stipulated wages of such teacher.*

The bill of exceptions shows a clear case of neglect of the teacher to perform this duty. It would seem, therefore, on the face of the statute, to be a case in which the teacher was not entitled to receive her wages; and if she was not entitled to receive them, then the district was under no liability to pay them. This result would not seem capable of being avoided, nor would it

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seem capable of being made plainer by discussion. In order to avoid it, it seems necessary to assume that the court may properly disregard and virtually repeal so much of said 8th section as prescribes said duty for teachers, and enacts the consequence to result from their neglect to perform it.

It is of no avail to say that the act does not in terms say that the teacher shall *forfeit* his wages; and therefore invoke the doctrine of a strict construction, as against *forfeiture*. The meaning of the statute is too plain for cavil. Call it by whatever name it may please any one to do, the provision is express, that the teacher is to perform the prescribed duty *before receiving his wages*. If by the law he has no right to receive them, it is passing strange that he may, nevertheless, compel the district, by suit, judgment and execution to pay them. But in this the teacher has *forfeited* nothing in the technical sense of a *forfeiture*. She has not entitled herself to receive the stipulated wages. She contracted to keep the school and thereby took upon herself the performance of all the legal duties enjoined and required, and particularly so far as the pecuniary interests and rights of the district depended, under the law upon such duties being performed by her. This she *neglected* to do; and hence, on very familiar principles, she was not entitled to claim and receive the wages. The contract was entire, and she must perform all she was legally bound to do, before her right to wages accrued; unless she showed a valid reason by way of excuse for her failure in this respect. This case is destitute of any such reason, and stands upon the naked fact that she *neglected* to perform such prescribed duty.

But if it were to be regarded as a *forfeiture* the case seems equally free from doubt. For the language and meaning of this provision of the statute are plain, and free from ambiguity or doubtfulness. It means just what its terms, in their natural and ordinary sense import, and hence there is no province for *construction* by the court; no ground given for the court to exercise the mystery of judicial construction, to evade or abrogate the obvious effect of the statute.

It seems too plain to be argued, that the purpose of the statute

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was to secure the performance of the prescribed duty, and as a most cogent motive, to make the right to wages dependent on such performance.

This view is corroborated by the general scope and obvious purposes of the statutes constituting our present common school system. The results to be attained by the Board of Education and its Secretary require that all the prescribed duties should be performed by the other officers, including teachers, who have to do with the carrying on all our common schools ; and particularly is it necessary that teachers should perform the duties prescribed by the statute for them, in order to furnish important matter for the work to be done by the Secretary of the Board. And beyond this, upon the performance of that duty in respect to the register by teachers, is made to depend the pecuniary interest of the district involved in its right to a share of the public money. Hence the reason for operating, by so stringent a motive, upon the assiduity and faithfulness of teachers in the discharge of that duty.

When the meaning and purpose of the statute is plain, the duty of the court is equally plain, to give the statute effect according to such meaning and purpose. It is not the legitimate province of the court to supervene upon it, and render it nugatory, either in view of the supposed severity of its operation in a particular case, or because the court may think such a provision of the law to be impolitic. Considerations of this kind are proper to be entertained and acted upon by those charged with the duty of making the law, but, by no means, fall within the province of those charged only with the duty of administering it. In this particular case, there is nothing shown, by reason of which, the plaintiff is entitled to claim that there would be any hardship. The duty is plainly prescribed. The register contains explicit directions for the performance of it in detail, with a copy of the law itself prefixed. Any person, qualified to teach a common school, is fully competent to understand, and do the whole duty in detail. This case shows simple *neglect* on the part of the teacher, without cause or excuse ; leaving it to be inferred, that she neglected its performance, as matter of choice. It shows further, the consequence of such neglect on the rights

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of the district, in respect to its portion of the public money; and thus illustrates what is above said, as to the essential importance of having the duty performed.

In the opinion delivered, in announcing the decision, it was said that the statute, in respect to the duty of the teacher in this behalf, might be regarded as *directory*. With great deference, I venture to-day, that, amongst all the cases, in which the courts have, with more or less reason, applied this unintelligible doctrine, in disregarding or abrogating explicit provisions of statute law, not one can be found to warrant its application in the present case.

So far as any principle, by which courts have professed to be governed, in holding certain statutes *directory*, in distinction from statutes *peremptory*, is capable of being defined, it is well put by Mr. Sedgwick on *statutory and constitutional law* 3C8, thus: "When statutes direct certain proceedings to be done in a certain way at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed."

The present case is clearly not of this character. It was not a mere disregard of *form, mode or time*, in the doing of the things required; but it was a neglect to do the thing at all, in any form, or mode, or in any time. I think this is the first case, in which a court of last resort has assumed to hold a statute to be merely *directory*, which requires certain things to be done, that are essential to the accomplishment of the leading purposes of the statute; essential, in order that the performance of the duty enjoined on other persons, holding important office under it, may be effective of the ends designed by the creation of such office; essential to the pecuniary rights of the district under the same statute; and which statute makes the performance of such duty, on the part of the claimant, a condition precedent to his right to receive pay of the district, in the capacity in which such duty is required to be performed.

Is this statute any more explicit in any of its provisions, enjoining duties upon other persons, connected with the administration of the common school system, under the laws of the State?

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Is it any more explicit in the closing clause of the 8th section? And in these respects, would it be said that it is merely *directory*? That is, that the persons charged with those duties, may reject them at pleasure, and no legal consequence will follow? or, that the district may have its share of the public money notwithstanding its school register shall not have been filled out and filed in the town clerk's office, pursuant to the provisions of this act? I think not, and, for the same reason, I think it not warrantable to treat as *directory*—that is, of no importance—the provision as to the duty of the teacher, and, his right to receive his wages, when he has neglected to perform that duty, upon which his right to receive such wages is made to depend.

On the subject of holding statutes to be *directory* it is proper to refer to *Holland et al v. Osgood*, 8 Vt. 276; *Briggs v. Georgia*, 15 Vt. 61; *Corliss v. Corliss*, 8 Vt. 373.

I pass, without discussion, what seems to me to be another unwarrantable feature of the decision, viz: allowing the recovery by the plaintiff with the deduction of what the district lost of public money, in consequence of the neglect of the teacher to keep and return the register, as the statute requires. This is allowing *recoupment* of damages by the defendant; a practice which has been adopted by the courts of some other states, but which this court expressly declined to adopt in a case in Chittenden county, some two years ago, which I do not find to have been, as yet, reported. If the statute is of any significance, it seems to me entitled to govern the plaintiff's right of recovery, and the measure of such recovery; and, if entitled to recover at all, I do not discover any measure but the stipulated wages. If the defendant would claim any deduction, it should be asserted by plea in offset, unless the declaration was for *quantum meruit*, which does not appear to have been so in this case.

Woodcock v. Bolster.

ELMER J. WOODCOCK v. JOEL C. BOLSTER, *Appellant*.

School District. Vacancy. Officer de facto. Qualification of voter and office-holder in towns and school districts. Collection of Taxes.

The offices of a school district do not become vacant merely by the neglect of the district to maintain a school as required by No. 32 of the acts of 1859, and No. 4 of the acts of 1860. (see General Statutes, chap. 22, sec. 40. Such neglect merely furnishes a reason for vacating the offices, and they do not become vacant until the selectmen have made new appointments.

If a clerk of a school district, who has been irregularly elected, acts as clerk *de facto*, and, as such, regularly calls an annual meeting of the district, the irregularity of his election will not affect the validity of the election of the officers regularly elected at such meeting.

If one be elected sole prudential committee of a school district who is by law ineligible, his assessment of a tax voted by the district will be invalid.

It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman.

The erroneous declaration of a tax-collector at the sale of property distrained for taxes, that he has sold enough property to satisfy the tax and costs, and that he shall sell no more, does not prevent him from legally proceeding, on the same occasion and without any adjournment of the sale, to sell sufficient property to meet the tax and costs.

TRESPASS for taking a waggon, one neck yoke and two straps, one whiffletree, one evener and two clevises. The defendant justified the taking and disposing of the property by virtue of a tax bill and warrant issued to him as collector of school district No. 8, in Winhall. The following facts were agreed upon :

There has been, for some eight or ten years, in Winhall, a legally organized school district, known and designated as district No. 8.

At the time of the assessment of taxes hereinafter mentioned, the plaintiff had a legal grand list of eleven dollars, on which he was liable to pay taxes in such district. The district have acted, and have been recognized as a regular school district, from their organization some ten years since, and have regularly, and from time to time, chosen their officers until March, 1859, when they also elected their officers ; but they held no school meeting,

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and made no election of officers for the year 1860, nor were any appointed by the selectmen of the town of Winhall, and during the whole of the school year, commencing April 1st, 1860, the district neglected to cause a common school of any grade to be kept or taught in the district for any period whatever.

In the early part of March, 1861, some doubts were entertained by certain members of the district, whether the district had not lost its organization by its non-compliance with the statute of 1859, and thereupon application was made by certain members of the district to the selectmen of Winhall for re-organization. The selectmen thereupon proceeded to organize it anew, by calling a meeting of the school district on the 12th of March, 1861, when, under the superintendence of one of the selectmen, a board of officers for the district, consisting of a moderator and clerk, were elected, who were the same persons legally elected to the same offices at the last election of officers in the district in March, 1859. The clerk so elected on the 12th of March, 1861, then warned a school meeting of the district, (giving the proper notice,) to assemble in the school house in the district, on the last Tuesday of March, 1861, for the purpose of electing officers of the district for the ensuing year, and, among other things, "to see if the district would vote to build a shed to put school wood in." On the 26th of March, 1861, agreeably to such warning, the district held their school meeting, and elected the defendant collector, and one Patrick Duane, an unnaturalized Irishman, then a resident, and the owner of real and personal estate, in such district, duly assessed to him in the grand list thereof, the sole prudential committee.

Said Patrick Duane was born in Ireland, and resided there until after he was twenty-one years of age, when he migrated to this country, and has never been naturalized.

The defendant as collector, and Patrick Duane as prudential committee, accepted their respective appointments, and on the first of April thereafter entered upon their respective duties.

Pursuant to a vote of the district, passed at the school meeting held on the 26th day of March, 1861, warned as aforesaid,

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Patrick Duane, as prudential committee, assessed a tax upon the lists of the inhabitants of the district, and on the lands in the district belonging to persons living out of it, and in such tax there was assessed against the plaintiff, upon his list, the sum of nine dollars and seventy cents, (his proper quota or proportion of such tax) and a rate bill and warrant in due form were issued to the defendant as collector, to levy and collect such taxes. The defendant properly demanded such tax of the plaintiff, who refused to pay the same; whereupon the defendant, as collector, by virtue of such rate bill and warrant, distrained the property above mentioned, and advertised the same for sale, in due form, according to law. On the day of sale the defendant first offered for sale the wagon, and sold the same at public auction to the highest bidder, for the sum of eleven dollars and sixty-two cents, and then said he should not sell any more of the property until he had figured up his costs; and having figured up his costs, he said to the persons and bidders present that he had sold the wagon for a sum sufficient to pay the tax and costs, and should not sell any more.

The plaintiff then caused the writ in this case to be served on the defendant, whereupon the defendant, uttering some revengeful threats, called back the dispersing audience, and sold the remaining articles described in the declaration, at public auction, to the highest bidder, for one dollar and thirty-seven cents. The tax against the plaintiff then amounted to nine dollars and seventy cents. The defendant travelled, in connection with the collection of such tax, fifteen miles, for which he taxed as costs ninety cents. He necessarily employed one man and a yoke of oxen to assist him in moving the property one half mile, for which he taxed fifty cents; for keeping the property to the time of sale he taxed fifty cents, for removing the property to the place of sale he taxed fifty cents, for eight per cent commission he taxed seventy-seven cents, and for levy he taxed twenty-seven cents, amounting in all to three dollars and forty-four cents, which, with the tax, amounted to thirteen dollars and fourteen cents.

The whole of the sales amounted to thirteen dollars and nine-

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teen cents, and the plaintiff has never demanded the overplus of five cents of the defendant, or an account of the tax and costs, which costs the defendant now claims.

The parties agreed that the wagon was worth	\$18.00
The neckyoke and straps,	1.90
And the eveners, whiffletrees and clevises,	1.34

Upon these facts the county court, at the December Term, 1861, KELLOGG, J., presiding, rendered judgment for the defendant, to which the plaintiff excepted.

H. K. Fowler, for the plaintiff.

Butler & Wheeler, for the defendant.

POLAND, CH. J. The first of the plaintiff's objections to the sufficiency of the defendant's justification is, that the defendant was not legally elected collector.

This rests wholly upon the ground that the meeting of the district, at which he was elected, was notified by a person who was not legally holding the office of clerk of the district. He was elected clerk at the annual meeting of the district in March, 1859, which is conceded to have been a valid election, and was also elected clerk at the meeting of the district on the 12th of March, 1861, called by the selectmen to re-organize the district, and no other person had been elected or appointed to the office in the meantime.

It is claimed that he could not legally be regarded as holding the office under the election of 1859, by reason of the acts passed in 1859 and 1860, and the failure of the district to cause a school to be kept in the district for the period of four months during the school year succeeding April 1, 1860; that thereby the district offices became absolutely vacated, and the officers last elected wholly disqualified to act, whether the selectmen appointed others or not. We are of opinion that the language of the acts referred to, does not require so stringent an interpretation, and that the failure of the district to cause a school to be kept as provided, is to be treated as a cause or reason for vacating the offices, but that the officers are not absolutely displaced and ejected

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from office, until the proper steps have been taken, and the selectmen have taken action upon the matter, and appointed others. It might be a matter of dispute, whether there had been a failure on the part of the district, to cause a school to be kept for the required period; there might be a failure of but a single day, and that might be the result of mistake or accident, so as not to bring the case within the spirit, though within the letter of the statute, so that the selectmen might refuse to interfere and make a new appointment. Or it might happen, that there had been a failure to make exact compliance, when all parties supposed there had been such a compliance, and the district officers had consequently gone forward in the prosecution of their appropriate official duties. If, on subsequent discovery of this failure, all the acts of the district officers are to be held void, and they liable for all their official acts as wrong doers, it would lead to great mischief. This interpretation saves all the beneficial purpose of the statute, by giving the selectmen the power of removal, by the appointment of others, and avoids the many evils that might flow from the adoption of the plaintiff's view, that such failure absolutely determines the office, so that the officer has no power to act. And this view of the statute is by no means a novel one.

In many cases where statutes have used the word *void*, it has been construed to mean *voidable*; ground or cause for making void.

So where statutes use the word, *forfeit*, or *forfeiture*, they have usually been construed to mean *cause of forfeiture*; and some proceeding or action must be had to effect it, before any actual forfeiture is incurred. Without reference therefore to the election of March, 1861, we think the clerk, who called the meeting at which the defendant was elected, held the office, so that his act in calling the meeting was legal.

There is no claim now made that the district had become disorganized so that there was any proper occasion for a new organization. But another election at this meeting of the former clerk to the same office could not prejudice his right to hold it under the former election.

But if the clerk, who warned the meeting at which the defendant was elected collector, held the office only in virtue of the election

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at the meeting called by the selectmen, we think it would not render the defendant's election invalid. The clerk held and exercised the office by virtue of an election at a meeting of the voters of the district, publicly called, and held the office *de facto*, which, so far as third persons are concerned, is all that is required to make his acts valid. This well settled doctrine, as to the validity of the official acts of persons acting under color of office, where some irregularity has occurred in his appointment, or election, or induction into office, where others are concerned, is especially important as applied to school districts, whose proceedings are usually conducted by men little versed in legal learning, and often by men of small attainments in any branch of education or business.

Suppose, at a school district meeting for the choice of officers, the notice lacks one day of the number required by statute. The election is so far invalid that none of the officers could justify in a suit brought against himself for any official act.

But if the clerk elected at such meeting calls the next annual meeting of the district, at which officers are elected, are those elections invalid, on account of the irregularity in his election? If so, the same consequence would attend the next election, and the district thus become effectually disorganized.

The plaintiff's second objection to the defence set up is, that the tax which the defendant had to collect, was illegally assessed, because the committee who assessed it, and who was elected by the district, was an unnaturalized foreigner, who, as he claims, could not vote in the meetings of the district, and was not eligible to any office in the district. It has been suggested by the defendant's counsel, that if such person was not legally eligible to the office, still he might be an officer *de facto*, whose official acts would bind third persons. But this doctrine, we think, could not be extended to cover a case where by law the person could not hold the office, and if such foreigner was not by law eligible to the office of committee, his acts cannot be regarded as valid, any more than those of a woman or minor who should be elected to the same office.

The question presented is certainly one of very considerable practical importance, as it is conceded that the right to hold

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office in the district, and the right to vote in school meeting, depend alike on the answer, and still further that the right of voting in town meetings, and of holding a town office, are subject to precisely the same objection and to the same extent.

The provision of the statute in relation to voters in school districts, is as follows : " And any man of the age of twenty-one years, who, at the time, shall reside, and be liable to pay taxes in such district, shall be a legal voter in the same" ; sec. 23, chap. 20, Com. Stat. p. 146.

The right to vote in town meetings is thus defined in the statute : " Every male person of the age of twenty-one years, whose list shall have been taken in any town the year preceding his voting, and all persons exempt from taxation in consequence of having arrived at the age of sixty years, shall, during their residence in such town, be legal voters in town meeting" ; sec. 1, chap. 15, Comp. Stat. 112.

It will be found by examining the earlier statutes of the state, that these provisions in relation to the right of voting in town and school district meetings have been substantially the same as now, from the beginning almost of our state legislation.

Notwithstanding the very plain terms used by the statutes to define the qualifications of voters in town and school district meetings, the plaintiff insists that none but *freemen*, who are entitled to vote for representatives to the legislature, and for county and state officers, are really entitled to vote at such meetings. The argument is that the qualification required by the statute is synonymous with that of the old constitution as to freemen, and that when the amendment to the constitution was adopted in 1828, which excluded aliens from becoming freemen of this state, until they had been duly naturalized according to the laws of the United States, it worked the same change in the qualification of voters in town and school meetings.

But the very starting point assumed in this argument is untrue. The old constitution provided that " every man of the age of twenty-one years, having resided in the state for the space of one whole year next before the election of representatives, and is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a freeman

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of this state." Under this provision of the constitution an alien might become a freeman of this state, and entitled to vote for representatives to the legislature and for state officers, without being naturalized according to the acts of Congress, by residing one year in the state and taking the freeman's oath. But this requirement was by no means synonymous with that of a voter in town or school meeting. A man could be a freeman without being a tax payer, but must have resided in the state a year, while no man could vote in town or district meetings without being a tax payer, but might, though his residence in the state had been less than a year. But even if there had been the agreement between the requirement of the old constitution as to the qualification to become a freeman, and that of the statutes defining the qualifications of voters in town or school meetings which the plaintiff claims, we fail to see how it would follow that a change of the constitution in relation to the qualifications of freemen should work a corresponding change in the statutes regulating voting in town and school meetings; and more especially, when the same statutes have several times been re-enacted in substantially the same language, since the amendment of the constitution, and all the while, we believe, under a practical construction entirely different from what the plaintiff claims. It has not been questioned but that it is actually within the power of the legislature to regulate the right of voting in such meeting, and the right of holding office, according to their pleasure, and that there is nothing in the constitution restraining its exercise. An instance of the exercise of such power by the legislature is shown in the requirement of the statute, that all the more important of the town officers shall be freeholders, which continued from a very early day down to within a few years.

Yet it was never required that a man should be a freeholder to be a freeman, or to be eligible to any office provided for in the constitution. The provisions in our election laws that the constable of the town shall be the presiding and certifying officer of freemen's meetings, and that the selectmen of the town shall form a part of the board of civil authority to determine the qualification of voters, are relied upon as showing the understanding of the legislature that these officers shall themselves be free-

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men. These were adopted at an early day under the old constitution, when so short a period of residence was required in order to entitle any man to become a freeman, and the number of aliens in the state was so few, that but little probability existed that any but a freeman could be elected to such office, and as no practical difficulty was experienced, they have been continued to the present time. Although it seems incongruous that any but freemen should be allowed to act as officers in freemen's meeting, still there is nothing legally incompatible with it, and we cannot regard these provisions as sufficient to override the direct and positive language of the statutes as to who may vote and hold office in towns and school districts. It is also urged, that, upon general principles of public policy, unnaturalized foreigners should not be allowed this limited right to vote and hold office; that with so little education as they usually have, and such limited knowledge of the principles and policy of our government as they possess, there is danger in allowing them to exercise even so small a share in the government and management of our educational and municipal institutions. If we were satisfied with the soundness of this objection, it could have but little influence on our decision, as our duty is limited simply to the determination of what the legislature have enacted, and we have little to do with the reasons or policy by which they were actuated. But we are not satisfied that the objection itself is sound.

By the liberal principles adopted by our government, foreigners, who come to reside among us, after five years' residence, and after complying with the laws of Congress in relation to naturalization, become equally entitled with native born citizens to participate in all the affairs of the government, both in making and administering the laws. It has been the policy of our government to encourage emigration from abroad, and, at as early a period as may be, to extend to such emigrants all the rights of citizenship, that their feelings and interests may become identified with the government and the country. While awaiting the time when they are to become entitled to the full rights of citizenship, it seems to us a wise policy in the Legislature to allow them to participate in the affairs of these minor municipal corporations,

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as in some degree a preparatory fitting and training for the exercise of the more important and extensive rights and duties of citizens. It is of the greatest importance that the children of such persons should be educated, at least to the extent for which opportunity is afforded by our common schools, and that the parents should be induced to send their children to school, and it seems to us that they would be much more likely to do so, and to take interest in their attendance and improvement, if allowed to participate in their regulation and management, than if wholly excluded. We cannot see the threatened danger to our institutions from the allowance of this right, while they are excluded from all influence and participation in the law-making power of the government, or in the general elections, or the general public administration of the laws of the country. So far as we have had personal knowledge of the practical construction of these statutes, it has been entirely in accord with the view we have taken, and if we have mistaken the intent of the Legislature, we have the satisfaction of knowing that it can be easily and speedily corrected.

The remaining objection is to the regularity of the defendant's proceedings in the sale of the plaintiff's property.

If the defendant had so far suspended the proceedings of the sale, as really to make the sale at a different time from that given by his notice of the sale, such after sale would doubtless be illegal. But there appears to have been no adjournment of the sale, and no great delay in the time, and the mere declaration of the defendant that he should sell no more, was of no importance. If he had not sold enough to pay the tax and cost, he had the right to sell sufficient, and if the law gave him the right to do so, his motive was of no importance.

Judgment affirmed.

Batchelder v. Nourse.

JOHN G. BATCHELDER v. ALONZO C. NOURSE, *Appellant.**Justice of the Peace. Jurisdiction.*

A justice of the peace is not legally disqualified to take jurisdiction of, and try, a case for the reason that he has previously, as one of a board of arbitrators between the same parties, and in reference to the subject matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion and expressed it to his associate arbitrator.

ASSUMPSIT. The defendant pleaded in abatement, that the plaintiff's claim had been by the parties referred to the arbitration of a board of arbitrators of which one Mead, the justice of the peace before whom this action was originally tried, was one; that a trial of the matter so submitted was had by such board of arbitrators; that Mead was present and acted as one of the board, and, after hearing the parties and their proofs, expressed his opinion that the plaintiff was entitled to recover, and that afterwards he signed and issued the writ in this cause, and rendered judgment therein.

The plaintiff replied that the arbitrators had never published any award in respect to the matters submitted to them.

The defendant rejoined that Mead refused to agree with his associate arbitrators, and therefore no award was made, but yet he announced his opinion, before he signed the writ in this case, that the plaintiff was entitled to recover.

To this rejoinder the plaintiff filed a surrejoinder that such opinion was only expressed while the arbitrators were attempting, in private consultation, to agree upon an award.

To this surrejoinder the defendant demurred generally.

The county court, at the December Term, 1862, KELLOGG, J., presiding, rendered judgment, *pro forma*, sustaining the demurrer, and that the plaintiff's writ be quashed.

To this judgment the plaintiff excepted.

P. H. Hutchinson, for the plaintiff.

H. K. Fowler, for the defendant.

BARRETT, J. The pleadings in this case present for decision the single question, whether a justice of the peace is legally dis

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qualified to take jurisdiction of, and try, a case for the reason that he had previously, as one of a board of arbitrators between the same parties, and in reference to the subject matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion and expressed the same to his associate arbitrator. It is purely a question of legal disqualification. Aside from the alleged cause of disqualification, it is conceded that he had lawful jurisdiction and right to try the case.

To solve this question, the statute, endowing the justice with his official character, and defining his rights, duties and disqualifications, is to be resorted to; and this as well to determine what is the policy of the law, as to ascertain what is specifically conferred and prohibited.

On looking into the statute, it is found there to be specifically provided what shall disqualify a justice from exercising, in the given case, the functions appertaining to that office.

Upon familiar principles of construction, other causes of disqualification in this respect are to be regarded as excluded,—and only those enumerated are to be held as effectual to disrobe him of his official capability in the particular case.

The cause here assigned is outside of the terms, and equally must be regarded as outside of the policy, of the statute.

While we should find occasion to commend the good taste and good sense which would cause a justice, in such a case as this, to decline to officiate, yet, upon the law as it exists, we are unable to hold that he is not lawfully entitled to ply his office, if neither taste nor sense is operative and effectual to restrain him from such an impropriety.

Without discussing the subject more largely at this time, we feel compelled to hold the surrejoinder to be sufficient, and therefore the judgment of the county court is reversed, with costs, and *respondant ouster* awarded.

The case is remanded to the county court.

Moore v. Smith.

WEBSTER O. MOORE v. RALPH SMITH, *Appellant*.

Assignment for the benefit of Creditors.

The rule requiring a change of possession of personal property, as against the creditors of the vendor or assignor, does not apply to the assignment of property for the benefit of creditors, made in accordance with the statutes of this state on that subject.

TRESPASS for taking certain articles of personal property. Plea, the general issue with notice of special matter in defence.

The following statement of facts was agreed upon by the parties :

On the 2nd of September, 1861, one Moore made at Rupert, in this state, an assignment to the plaintiff of his property, consisting of real and personal estate, for the benefit of his creditors, in pursuance of the statute in relation to such assignments. The plaintiff at the same time duly filed a bond in the proper probate court for the faithful performance of his trust as such assignee, which bond was accepted by the probate court. On the same day the plaintiff also filed a true copy of the assignment, together with an inventory of the property assigned, and a list of the creditors to be benefited, in the county clerk's office for Bennington county. The plaintiff immediately accepted such assignment, and entered upon his duties as assignee.

After the assignment, Moore, the assignor, continued to reside on the real estate which was assigned, the same as before the assignment. The assignor did not, previous to the trespass complained of, occupy or take actual possession of such real estate. After the execution of the assignment the assignor, with the plaintiff's consent, on several occasions used the personal property described in the declaration, for his own benefit, the same as before the assignment. On the 29th of September, 1861, Moore borrowed said property of the plaintiff and used it, and, after using it, put it in the barn on the assigned premises, which premises he was then occupying. Early the next morning, while the property was still in said barn, the defendant, as constable, attached it on a writ against Moore, in favor of one Danforth, a creditor named and provided for in the assignment. The value of the property so attached was seventy-five dollars.

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Upon these facts the county court, at the June Term, 1862, KELLOGG, J., presiding, rendered judgment *pro forma*, for the defendant, to which the plaintiff excepted.

H. K. Fowler, for the plaintiffs.

R. Howard, for the defendant.

BARRETT, J. The only question presented by the facts agreed upon is, whether any thing more was necessary to be done than was done, in order to protect the assigned property in the assignee, against the attachment of the creditors of the assignor. In other words, whether the law will imply fraud, as against such creditors, from the facts reported. No question of *fraud in fact* is involved; but only one of what is called *fraud in law*, as depending on the facts as to possession.

On this point, the provision of the statute of 1857, No. 11, sec. 3, seems explicit and conclusive. It is in terms, that after the copies of the assignment and bond have been filed, as required by the statute, the assigned property shall not be liable to attachment and execution at the suit of the creditors of the assignor. The statute prescribes what is to be done in order to a valid assignment of the property, and when that is done, the assigned is invested with a valid title, unless it be affected with fraud in fact. The principle of *Vail v. Peck et als.*, 27 Vt. 764, is directly applicable to this case.

Judgment reversed, and judgment for the plaintiff, for the value of the property, as agreed.

Thayer v. Lyman et al.

NELSON THAYER v. A. P. LYMAN, AND TRUSTEE, THE TOWN OF
WOODFORD.

Towns. Selectmen. Town Treasurer. Trustee Process. Principal and Agent.

Notice to a majority of the selectmen of a town, or to the town treasurer, of the assignment of a town order, is sufficient to prevent its attachment by the creditors of the assignor by means of the trustee process.

If the assignee of such an order authorize an agent to present it to the town treasurer for payment, that constitutes sufficient authority to the agent to notify the treasurer of its assignment to his principal.

TRUSTEE PROCESS. The case was referred to a commissioner who reported the following facts :

The writ was served on the trustee on the 14th of August, 1861. On the 3d of August, 1860, a town order was drawn by two of the selectmen of the town of Woodford upon the treasurer of that town for ninety-two dollars, in favor of the defendant, to whom it was delivered on the day of its date. This order is the one referred to in the opinion of the court as order B. On the same day the defendant sold this order to Henry G. Root, who sold it to William E. Park. Before the service of the trustee process Park notified two of the selectmen of Woodford that the order had been transferred to him.

On the 29th of June, 1861, another town order for \$30.32 was drawn by two of the selectmen of Woodford upon the treasurer of that town in favor of the defendant, and delivered to him within two or three days after its date. Within four or five days afterwards the defendant sold this order, which is designated in the opinion of the court as order C, to Henry G. Root. Root caused this order to be presented to the treasurer of the town of Woodford for payment on the 17th of July, 1861, by William E. Park, who at the same time told the town treasurer that the order belonged to Root. The commissioner reported that he found the fact of the notice by Park to the town treasurer that the order belonged to Root, solely upon the testimony of Park, which on this point, was as follows: "I presented order C. to the treasurer of the town of Woodford, and demanded

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payment thereon, July 17, 1861. The order belonged at the time to Henry G. Root. He handed it to me. I do not know whether I informed the treasurer at the time that the order was mine or Mr. Root's. I did one or the other. I cannot say that I told him that the order had been transferred from Mr. Lyman to Mr. Root. I told him the order was mine or Root's, one or the other."

Upon the commissioner's report the county court at the June Term, 1862, KELLOGG, J., presiding, decided that the trustee was not chargeable upon order B. To this decision the plaintiff excepted. The county court also decided that the trustee was chargeable upon order C., and to this decision the trustee excepted.

James B. Meacham and G. W. Harmon, for the plaintiff.

E. J. Phelps, for the trustee.

ALDIS, J. The plaintiff sued the principal debtor, and summoned the town of Woodford as trustee upon two town orders. Both had been assigned by the principal debtor. As to the order B. the assignee gave due notice to the selectmen (that is to two of them,) but gave no notice to the town treasurer of the assignment before the service of the trustee's process. The plaintiff claims that notice of the assignment must be given to the town treasurer on whom the orders were drawn and by whom they were to be paid, and that notice to the selectmen is not enough. But we think notice of the assignment, either to the selectmen or to the treasurer, is good and sufficient to protect the right of the assignee against the trustee's process.

Theoretically the treasurer is the officer to pay—practically he does little but protest for non-payment. The selectmen are especially the financial agents of the town. While the debt of the defendant against them was in an account, it was for them to examine and settle it and direct it to be paid. They are bound to keep a record of all orders they draw on the treasury, and hence have the means of knowing what orders are given and to

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whom. The treasurer can not know till the orders are presented to him.

If a trustee process is brought against the town it is to be served on the town clerk. It would be his duty to give notice of it to the selectmen; and it would be their duty and they would have the means of examining the matter and ascertaining if the town is liable. They have "the general supervision of the concerns of the town," sec. 43, C. S. chap. 15; draw orders for the payment of the debts of the town, sec. 48 and 49; and audit and allow all claims against the town, sec. 48, and present to the town at their annual meeting a statement of the property, finances and pecuniary situation of the town, sec. 50; all duties not committed to any particular officer and required by law, are thrown upon them, sec. 43.

If for any reason a town order which has been issued, ought not to be paid to the holder, it is obvious that it would be their duty to inform the treasurer and collector not to pay it, and the discretion to act and decide in the matter is by the necessity of the case confided to them. So too it seems to us that one holding a town order by assignment, if he wished to prevent the town from paying to any body else, should give notice to the selectmen,—within whose authority it would lie to act upon the notice.

The right to act and direct as to the payment of the debts of the town, unless otherwise limited or restrained by the town or by law, must rest with them, and does not pass away from them by their giving a town order.

But we also think that notice to the treasurer, he being the officer who by law is to pay town orders, would be sufficient. It would be his duty to inform the selectmen of such notice that they might act upon it as they deemed best.

We think, therefore, that the judgment as to the order B, by the county court was right, as notice to the selectmen was sufficient.

As to order C. Notice to the treasurer was found by the commissioner; and the evidence of Mr. Park coupled with the fact that the order belonged to Root and that therefore it is probable he would say it was Root's, and would not say it was his own,

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justifies the finding of the commissioner. If he was authorized by Root to demand payment, that was sufficient authority to give notice of the transfer of it to Root by Lyman.

The judgment of the county court is reversed as to order marked C, and judgment that the town of Woodford is not liable as trustee of the principal debtor, and the trustee to recover its costs.

JONATHAN HAPGOOD AND LEONARD HOWARD v. WILLIAM E. POLLEY, AND HIS SUBSEQUENT ATTACHING CREDITOR, THE WEST RIVER BANK.

Promissory Note. Consideration. Contract. Principal and Surety. Assignment.

The defendant executed to the plaintiffs jointly a promissory note payable on demand, in order that by a suit thereon they might become secured for all unmatured liabilities that they were jointly or severally under as his sureties, and for all their individual claims against him. The amount of the note was greater than the joint liabilities of the plaintiffs for the defendants, but less than the aggregate of their joint and individual liabilities for him and their individual claims against him. *Held*, that from the mere acceptance of such a note by the plaintiffs, the law implied an agreement by them to apply its avails to the debts it was designed to secure, and that such implied agreement furnished a sufficient consideration for the note.

Held, also, that such a transaction was equivalent to a special assignment of the defendant's property to the plaintiffs for the purpose of securing their liabilities for, and claims against, him, and, as such, was valid.

ASSUMPSIT on a promissory note for eleven hundred dollars, bearing date July 5th, 1860, signed by the defendant, and payable to the plaintiffs on demand with interest. The plaintiffs' writ was dated 19th July, 1860. At the December Term, 1860, when the action was entered in this court, the West River Bank, was, on application duly made, permitted to appear and defend

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this suit, as a subsequent attaching creditor of the defendant, agreeably to the provisions of the statute in such case. (Comp. Stat. p. 223, sec. 31.) At the December Term, 1861, the appearance for the defendant was withdrawn, and the defendant was defaulted. At the December Term, 1862, the cause stood for a hearing upon the assessment of damages, and the hearing was had by the court, KELLOGG, J., presiding.

On the hearing, the following facts were found, to wit:—On the 20th of April, 1860, both of the plaintiffs became sureties for the defendant, (who was a merchant then doing business in Peru,) on a promissory note for \$250,00, payable to the Battenkill bank, which became due on the 20th of July, 1860, and on the 12th May, 1860, both of the plaintiffs also became sureties for the defendant on a promissory note for \$300,00 payable at the Battenkill Bank, which became due on the 12th of July, 1860; and, on the 5th July, 1860, the plaintiff Hapgood became surety for the defendant on a promissory note for \$200,00, payable at the Battenkill Bank, which became due on the 5th September, 1860. On the 5th July, 1860, the plaintiff Howard and one Russell Aldrich became sureties for the defendant on a promissory note for \$400,00, payable to the Battenkill Bank, which became due on the 5th October, 1860, and, on the 19th June, 1860, Howard and Aldrich became sureties for the defendant on a promissory note for \$500,00, payable to the West River Bank, which became due on the 19th September, 1860. On the 18th July, 1860, the defendant was indebted to Hapgood on a promissory note, which, with interest, amounted to \$51,50, and also was, on the same day, indebted to Howard on three promissory notes, and for money loaned, amounting in all, with interest, to \$318,00. All of the foregoing liabilities were outstanding at the time of the making of the note for eleven hundred dollars in suit. At the several times when Hapgood became surety for the defendants as aforesaid, the defendant told him that he would give him any security which he might call for by way of indemnity for signing the said notes, and the defendant also gave to Howard assurances of the same character and effect at the several times when Howard became surety for the defendant as aforesaid, but nothing was at any time said by either of the plaintiffs to the defendant,

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or by him to them, about his giving a note for security or indemnity until the occasion when the note for eleven hundred dollars was made and executed, as hereinafter mentioned. On the 16th July, 1860, certain creditors of the defendant, caused the defendant's store of goods in Peru to be attached upon a writ in their favor against him, and closed. On the 18th July, 1860, Hapgood requested the defendant to give a note to secure the plaintiffs against their liability as sureties for him, and also to secure the amount of his private indebtedness to Hapgood. The defendant thereupon made and executed the said note for eleven hundred dollars,—it being the note now in suit,—with the knowledge and consent of both the plaintiffs, and delivered the same to Hapgood. Immediately upon the execution and delivery of this note Hapgood caused the present suit to be commenced upon it, and caused the defendant's store of goods to be attached thereon. Soon afterwards the West River Bank brought a suit against the defendant and caused the same store of goods to be attached thereon, subject to the previous attachments above mentioned. The defendant made, executed, and delivered the note for eleven hundred dollars, intending thereby to secure the plaintiffs to that amount for their claims against him severally, and for their liabilities for him as his sureties as aforesaid. There was nothing due from the defendant to the plaintiffs jointly at the time of the making of the note for eleven hundred dollars, nor was there, previous to or at that time, any transaction between him and them in which they had a joint interest, aside from this note. When this note was so executed the plaintiffs did not jointly, nor did either of them severally, assume the payment of any of the notes upon which they or either of them were liable for the defendant as surety; nor did they jointly, or either of them severally, undertake to indemnify the defendant against any of the notes upon which they or either of them were liable for him as surety, or against any portion of such notes; nor did either of the plaintiffs discharge any debt which was due to him from the defendant, or give up any securities then held therefor, but each continued to hold, and at the time of trial still held, the same securities for his private claims against the defendant which he held when the \$1100 note was executed. There was no other

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undertaking or promise on the part of either party, at the time of the execution of the note for eleven hundred dollars, than as above stated, unless it be implied by law from the facts above stated. The defendant had, before the making of the said note for eleven hundred dollars, pledged to Howard two horses to secure him for his debt against the the defendant, upon the sale of which Howard received \$185. On the next day after he note for eleven hundred dollars was executed, the defendant assigned certain notes and accounts in his favor to Hapgood, for the benefit of Hapgood, Howard, and Aldrich, to secure them for their liabilities upon the notes before mentioned as sureties for him,—from which Hapgood had at the time of trial collected a sufficient sum to amount with interest while in his hands to \$628,35,—one third part of which sum was on the 17th December, 1862, paid by Hapgood to the administrator of the estate of Aldrich. Hapgood had since the commencement of this suit, paid all the notes upon which he was liable as surety for the defendant as aforesaid, and Howard had since the commencement of this suit, paid the note for \$400,00 to the Battenkill Bank, and the note of \$500,00 to the West River Bank. Aldrich died in the fall of 1860, and Howard presented his claim for contribution, on account of the payments last mentioned, for allowance by the commissioners of claims against the estate of Aldrich, and the same was duly allowed by the commissioners to the extent of one half of the amounts so paid by Howard with interest thereon ; and, on the 17th December, 1862, the administrator of the estate of Aldrich paid to Howard sixty per cent. of the amount so allowed. The settlement of the estate of Aldrich was not closed at the time of trial. It was not questioned that the defendant was wholly destitute of property.

Upon these facts the court rendered judgment that the plaintiffs should recover of the defendant the full amount of the note for eleven hundred dollars, with the interest thereon, and should also recover of the West River Bank, as subsequent attaching creditor, nominal damages and all costs that accrued in the litigation of this suit after the entry of the subsequent attaching creditor to defend the suit. To this decision the West River Bank, as subsequent attaching creditor, excepted.

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Butler & Wheeler, for the West River Bank.

A. L. Miner, for the plaintiffs.

ALDIS, J. The plaintiffs were liable as sureties for the defendant to a much larger amount than the \$1100 for which they took his note; but they were not jointly so liable for so large a sum. But their liabilities with others, and the debts due to them individually, amounted, when added to their joint liabilities, to more than \$2000. Being thus liable for him as sureties, and he being desirous to secure them, and insolvent, and his personal property being under attachment, he executed this note for \$1100 payable on demand. They immediately commenced a suit on it and attached his personal property subject to the former attachment. In this way he was enabled to secure them. Is the note void for want of consideration? We think not.

1. The note having been given with a view to cover those liabilities of the sureties, the law implies an agreement on the part of the sureties to apply the avails of the note to those debts, and an assumption by them of the payment of them to that extent. If there had been an express promise, it is admitted it would have been valid. The law implies one.

Judge Putnam in *Little v. Little*, 13 Pick. 426, cited by the counsel of the creditor, says, when referring to *Cushing v. Gore* 13 Mass.:—"It was understood the plaintiff (the surety) was to pay the notes he had endorsed. There was no direct evidence, but the jury rightly inferred the fact. The court said it might be inferred from the mere fact of a note having been given with a view to cover those endorsements." Both the cases in Massachusetts hold that the contract may be implied—and when, before judgment is rendered on the new or collateral note, the surety pays the liability for the principal, he is allowed to recover. Here the previous promise to give security would be evidence from which the implied agreement might be held to be proved.

2. We think the transaction may be regarded as a mode of making an assignment of personal property from the debtor to

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the surety through the intervention of an attachment. He could not transfer any right in his property to them in any other way.

Such assignment of property from a debtor to his creditor or surety is special and has been held good in several cases decided since our general assignment law was passed.

Judgment affirmed.



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ABATEMENT.

In an action against an officer for negligence in keeping property attached by him, brought by one of the owners, the non-joinder of a co-tenant of the property as plaintiff cannot be used to defeat the action except by plea in abatement. Upon trial the objection can only avail in apportioning or severing the damages. *Briggs v. Taylor*, 57.

ACCORD AND SATISFACTION.

The acceptance by the holder of a promissory note of part of the amount due upon it, in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be cancelled, is a full discharge of the note, and no action can be maintained for the unpaid portion. *Ellsworth v. Fogg & Harvey*, 355.

ACKNOWLEDGMENT. See LIMITATIONS, STATUTE OF, 1, 2.

ACTION. See ATTACHMENT 3, 4; BAILMENT; CONTRACT 12; FRAUD 12; PROMISSORY NOTE 1.

ACTIONS PENAL. See PENAL ACTIONS.

ADMISSIONS. See FRAUDULENT JUDGMENT, CONVEYANCE OR AGREEMENT 3, 4.

AGENT. See PRINCIPAL AND AGENT.

ALIMONY. See MARRIAGE 8.

ALTERATION OF INSTRUMENT.

1. It seems that the alteration of a note in a material respect by the holder after its delivery, without the consent of the maker, will defeat a recovery not only upon the note itself, but also for the consideration for which it was given. *Bigelow & Hoagland v. Stilphens*, 521.

2. The material alteration of a written instrument by a stranger does not invalidate it, or prevent a recovery upon it as it originally stood. *Id.*

3. One who is simply an agent to sell goods and receive the notes of the purchasers for the price, and transmit them to his principal, is not the agent of his principal to alter a note after he has received it, and, in the absence of

any evidence that the principal consented to such alteration, or was aware of it, before bringing an action upon the note, he may still recover upon it as it stood before the alteration. *Ib.*

See PRACTICE 2.

AMENDS, TENDER OF. *See TENDER OF AMENDS.*

APPEAL. *See AUDITA QUERELA 1, 2; CHANCERY 3; ESTATES OF DECEASED PERSONS; INTOXICATING LIQUOR 1.*

ARBITRATION AND AWARD.

The submission of the subject matter of a pending suit to arbitrators, and an award made pursuant to the submission, is a discontinuance of the action, and the failure of a party to plead the award in bar at the term following its publication, and his consent to a reference of the cause to be decided according to law, will not estop him from insisting, after the report of the referees is filed, upon the legal effect of the submission and award as a discontinuance. *Babcock v. School District*, 250.

ARREST. *See BAIL ON MESNE PROCESS 1, 2, 3.*

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors, if made with the intent on the part of the assignor to hinder and prevent a particular creditor from getting his pay, either from the assigned property or otherwise, except at the pleasure of the assignor, is fraudulent and void as against such creditor, notwithstanding the assignee accepted and acted under the assignment in good faith and in ignorance of such purpose on the part of the assignor. *Stuckney & Co. v. Crane & Colcord, and Trustee*, 89.

2. Such assignment would not be rendered valid by the fact that the particular creditor whom the assignor intended to hinder from getting his pay, was by the terms of the assignment postponed to so many other creditors whom the assignor desired to have paid in the order of preference named in the assignment, that the assigned property would be exhausted before such particular creditor could be reached. *Ib.*

3. If an assignment for the benefit of creditors be fraudulent and void as to any particular creditor, such creditor may attach and hold the personal property and funds in the hands of the assignee by the trustee process. *Ib.*

4. But the assignee would not be chargeable under such trustee process with payments made by him to creditors, or even to the assignor, and in violation of the assignment, before the service of the trustee process upon him. *Ib.*

5. The assignee could not be charged under such trustee process for the amount of a note taken and held by him for assigned property sold by him on credit before the service of the trustee process. *Ib.*

6. The rule requiring a change of possession of personal property, as against the creditors of the vendor or assignor, does not apply to the assign-

ment of property for the benefit of creditors, made in accordance with the statutes of this state on that subject. *Moore v. Smith*, 644.

See CONSIDERATION 14; LIMITATIONS, STATUTE OF 5, 6.

ASSIGNMENT OF CHOSE IN ACTION. See TRUSTEE PROCESS 6, 13, 14.

ASSUMPSIT. See CONTRACT 5, 7.

ATTACHMENT.

1. An attaching creditor of real estate with notice, either actual or constructive, of the true state of the debtor's title, is bound by such notice, and stands in no better position than a purchaser with the same notice. *Ferrin v. Reeds*, 2.

2. But notice of the sale of personal property without change of possession will not affect the claim of an attaching creditor of the vendor. *Id.*

3. The general owner of property attached by his creditors may maintain a suit against the attaching officer for damage to the property attached through the officer's negligence, while the suit upon which the property is attached is still pending, and the attachment is still in force. *Briggs v. Taylor*, 57.

4. The rights of the creditor and officer in such cases may be protected by an order of court for the stay of execution, or the payment of the damages into court, to await the determination of the original suit in which the attachment was made. *Id.*

5. The expression in an officer's return describing the property attached "all the hay and grain in the barns and in stacks" on a particular farm, held to embrace grain in the straw. *Id.*

6. If it is necessary for the preservation of grain in the straw which has been attached, that it be threshed, it is the duty of the attaching officer to thresh it. *Id.*

7. A machine for shaving and splitting leather, operated either by hand, steam, or water, costing \$250, and weighing from six hundred to nine hundred pounds, operated by turning a crank, and, when worked by hand, requiring two men to work it, and which had to be fastened to the floor by cleats when in operation, held not to be exempt from attachment and execution as a tool necessary for upholding life. *Henry v. Sheldon*, 427.

8. Bank bills may be attached upon *mens process*. *Loujoy & Co. v. Lee and Trustee*, 430.

See ABATEMENT; EVIDENCE 5; PARTNERSHIP 2, 3; PRINCIPAL AND AGENT 2; SALE 2, 3, 4; TRUST, 1, 2, 3; TRUSTEE PROCESS 8, 9, 10; WRIT OF MALICIOUS ACT OR NEGLECT, CERTIFICATE OF 3

AUDITA QUERELA.

1. If, in a suit before a justice of the peace, not otherwise appealable, in which the defendant has pleaded the authority of a court in justification, the justice refuses to allow an appeal from his judgment, *audita querela* will not lie to set aside such judgment. *Bradish v. Redway*, 424.

2. The remedy of the aggrieved party in such a case is by petition to the county court under chapter 86, section 8, Comp. Stat., (Gen. Stat. p. 334, section 7.) *Ib.*

AUTHORIZED PERSON. *See* SERVICE OF PROCESS 1, 2.

BAGGAGE. *See* CARRIER 1, 2, 3, 4, 5, 6, 7.

BAIL ON MESNE PROCESS.

1. In *scire facias* against bail on *mesne process*, held to be a good plea on general demurrer, that the plaintiff promised the bail before the return day of the writ in the original action, that if they would cause their principal to attend the trial of the cause against him, they should be discharged as bail, and that, in reliance upon such promise, they did procure him to attend at such trial. *McFarland v. Wilbur et al.*, 342.

2. In *scire facias* against the bail of one arrested on *mesne process* in a civil action, held, that the defendants were discharged from liability by the fact that their principal had, during the pendency of the action against him, caused himself to be enrolled as a soldier for service under the government of the United States, and had ever since continued under orders for service under the authority of the United States. *Ib.*

3. The act of 1861, (Acts of extra session of 1861, No. 8, p. 186,) which was passed subsequent to the arrest of the principal in such case upon *mesne process*, having conferred upon him a privilege from arrest, his surrender by his bail would have been of no use to the creditor, and the bail are therefore not liable in *scire facias* for not surrendering him. *Ib.*

BAILMENT.

The special owner of property in his possession may recover its value from another who wrongfully takes it away from him, and the wrong doer can not ordinarily defeat the action, or reduce the damages, by proof that some other person is the general owner, unless he shows some connection with the general owner, so that he can stand upon his right, or that the property has really gone to his use. *Wooley v. Edson*, 214.

BANK BILLS. *See* ATTACHMENT 8; TRUSTEE PROCESS 8, 9, 10.

BANKS. *See* TRUSTEE PROCESS 12.

BASTARDY.

In a prosecution for bastardy the respondent gave no other bond than the one given before the justice of the peace as required by section 3 of chapter 71 of

the Compiled Statutes, and did not personally appear before the county court. The county court having ordered the payment by him of certain sums in instalments to the mother, it was held, that in *scire facias* against the surety on the bond, judgment might be rendered for the sums due on such order at the commencement of the action, but not for the present worth of the instalments not yet due. *Freeman v. Batchelder*, 13.

BOOK ACCOUNT.

1. In book account the county court has a discretionary power to deny full costs to the plaintiff if he fails to sustain his whole claim. *Watts v. Kuwamayh and Trustee*, 34.

2. The defendant's cattle having trespassed upon the plaintiff's land and damaged his crop of oats, through the defect of a division fence which both parties were under an equal obligation to keep in repair, the defendant told the plaintiff that he would allow him what was right for the oats when they came to settle. Held, that this was not sufficient to warrant a recovery by the plaintiff in book account for the damage to the oats. *Winn v. Sprague*, 243.

3. The plaintiff delivered money to the defendant to be carried by the latter, as a mere messenger, to a third person. The defendant agreed so to deliver the money, but neglected to do so. Held, that the plaintiff could not maintain book account for the amount of money so delivered. *Drury v. Douglass*, 474.

CARRIER.

1. A passenger, arriving with baggage by cars at a railroad station, is justified in regarding the man who handles and takes charge of the baggage on the arrival of the train, as the agent of the railroad company which has brought the passenger there, and notice to such man while he is handling the baggage, in regard to its destination, is notice to such company. *Quimit v. Henshaw et al.*, 605.

2. It is the duty of a railroad company in regard to the baggage of a passenger, which has reached its final destination, to have the baggage ready, upon its arrival, for delivery, upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for it, then the company must put it in their baggage room and keep it for him, and their custody of it then is only that of warehousemen. *Ib.*

3. As regards the liability of a railroad company, as a common carrier, for baggage after its arrival at its final destination, the reasonable time, within which the owner must apply for it, is directly after its arrival, making due allowance for the delay necessarily occasioned by the crowd on the platform. *Ib.*

4. The lateness of the hour of arrival does not excuse the passenger from the duty of forthwith claiming his baggage, provided it is placed on the platform and ready for delivery, so that he can receive it. *Ib.*

5. Where railway passenger trains arrive at a late hour of the night and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting road, to put it in their baggage room, and keep it for delivery in the morning to the servants of the other road, when called for by the owner, and requested to do so, their custody of the baggage during the night is that of carriers, and not of warehousemen. *Id.*

6. The course of business and the practice of a railroad company in respect to the custody of baggage passing over its line, and to be transferred to a connecting road, is of great importance in determining the nature of its liability therefor. *Id.*

7. Whether a bed, pillows, bolster and bedquilts, belonging to a poor man, who is moving with his family, carried along with him in a railroad train, and packed in his trunk or box containing his clothing, are baggage or not, is a question to be decided by the jury, taking into consideration the particular circumstances of the case, and the use, quality, value and kind of the articles in question. *Id.*

CHANCERY.

1. The orator conveyed to the defendant a lot of land on which was a spring from which the orator by means of an aqueduct supplied his own and other premises with water. The aqueduct was of greater value to the orator than the price he received for the land. By the mistake of the orator, who did not intend to part with the right to use the water from the spring, the deed to the defendant contained no reservation of such right. The defendant, at the time he purchased, had no knowledge of the existence of the spring. *Held*, upon a bill in chancery for that purpose, that the orator was entitled either to a conveyance from the defendant of the right to use the aqueduct, or to a reconveyance of the land on repaying to the defendant the price thereof, and that the defendant might elect which of these modes of relief the orator should have. *Brown v. Lamphear*, 252.

2. Where a mistake in a conveyance is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, a court of equity will interfere in its discretion to prevent intolerable injustice. *Id.*

3. An appeal from the decree of a chancellor to the supreme court vacates the decree, both as to the merits of the case, and the costs. *Gale v. Butler*, 449.

4. When a cause is remanded from the supreme court to the chancellor, it is the latter's duty to conform his decree to the judgment of the supreme court, so far as they have adjudicated the cause; but if no direction has been given as to an incident of the decree, like costs, it is his duty to determine it. *Id.*

6. And if in his judgment justice requires that some further proceeding should be allowed in the cause, it is within the chancellor's power to allow it to be had. *Ib.*

8. In the examination of witnesses in chancery, the practice of having the questions shown to the witness, and his answers prepared beforehand, and reduced to writing and examined by counsel before coming before the master to testify, severely reprehended. *Hickok v. Farmers' and Mechanics' Bank et al.*, 476.

7. If a surety upon a promissory note give a mortgage to the holder to secure its payment, in a proceeding in chancery to foreclose such mortgage the principal upon the note should be made a party. *Davis v. Converse et al.*, 503.

8. If, in such a foreclosure case, the principal is not made a party, and he has made payments of usury *eo nomine* upon the mortgage note, on the face of which no usury was included, and he appears before the master on the assessment of the amount due, and claims that such usury be applied as payments towards the principal of the note, he will be estopped from afterwards recovering such usury of the person to whom it was paid, and the defendants in the foreclosure proceeding are entitled to have the benefit of such application. *Ib.*

9. But if six years have elapsed since the payment of the usury before the principal signifies his election to have it applied as a payment upon the note, his right to make such election is barred by the statute of limitations. *Ib.*

See HOMESTEAD 2; HUSBAND AND WIFE; MORTGAGE 9; PARTNERSHIP 4;
PRINCIPAL AND SURETY 1, 2, 3, 4; RAILROAD.

CHARTER. See CORPORATION.

COMMON CARRIER. See CARRIER.

COMMON LAW. See MARRIAGE 3.

CONFIDENTIAL COMMUNICATIONS. See EVIDENCE 30.

CONSIDERATION.

1. An injury to the promisee, as, for instance, if he incurs expenses in reliance upon the promise, or a benefit to the promisor, is a sufficient consideration for a promise. *Dorwin v. Smith*, 69.

2. The receipt by one person of the property of another, for the purpose of paying the latter's debts, constitutes a sufficient consideration for a subsequent promise by the former to a creditor of the latter to pay his claim. *Smith v. Estate of Rogers*, 140.

3. The testator had received from B. a transfer of the latter's property, and had also brought a suit against B. and attached the same property. The plaintiff, a creditor of B., claiming that the testator had received B.'s property with-

out consideration, and that he had no debt against R., procured a writ in his favor against R., in order to attach the property so transferred and to summon the testator as R.'s trustee. Before this writ was served the testator told him that if he would hold on he would pay him his claim against R. The plaintiff, in reliance upon this promise, forbore to have his writ served, and the property was sold upon the testator's execution. *Held*, that the testator's promise was based upon a sufficient consideration, and that it was an original undertaking and not within the statute of frauds. *Ib.*

4. After the promise the plaintiff, by the testator's direction, took notes to himself from R., for his debt, payable with annual interest. *Held*, that, notwithstanding this, the plaintiff, as against the testator, was only entitled to simple interest upon his debt against R. *Ib.*

5. The conveyance by a debtor of all his attachable property for not more than half its value, is void as to existing creditors, on the ground of inadequacy of consideration. *Church v. Chapin*, 223.

6. Neither does the fact that the grantee engages, as an additional consideration of the grant, to support the grantor during life, render the conveyance valid as to creditors. *Ib.*

7. *Quere*, whether the agreement by the grantee with the grantor to pay to a third person a sum equivalent to the value of the property conveyed, (which sum the grantor designs as a gift to such third person,) constitutes a valid consideration for the conveyance of all the grantor's attachable property, as against his creditors. *Ib.*

8. The question whether a debtor who conveys property without such a consideration as is valid against creditors, reserves sufficient property for the payment of his existing debts, so as to prevent the conveyance from being void, depends on the amount and nature of the property, in connection with its character and situation, in reference to the facilities it affords creditors for collecting their debts. *Ib.*

9. The reservation by the debtor merely of cash on hand and debts due him from out of the state, so that they can not be attached by the trustee process, though amounting in the aggregate to the sum of his debts, will not suffice to render valid a conveyance which, without any reservation of property, would have been invalid as to creditors. *Ib.*

10. In order to entitle a creditor to impeach a conveyance of his debtor for want of sufficient consideration, where there is no fraud, it must appear that he was a creditor at the time of the conveyance, and a judgment in his favor against the grantor, founded on a debt due at that time, is not conclusive against the grantee, unless he was a party to it directly, or appeared and defended the case in his own behalf to protect the property conveyed to him. *Ib.*

11. The defendant purchased certain premises and gave the promissory note in suit to the grantor in part payment therefor. He entered into possession and occupied the premises for two years. The use of the premises was

worth more than the amount of the note, but during his occupation the defendant expended as much in repairs as the value of the use of the premises. His grantor's title having entirely failed, the defendant sought to defend an action upon the promissory note upon the ground of failure of consideration. *Held*, that to establish this defence it must appear that the repairs made by the defendant were necessary in order to render the use of the premises of any value. *Foster v. Phaley et al.*, 303.

12. *Held*, also, that the fact that the defendant continued to occupy the premises during the pendency of the controversy which finally resulted in establishing the defect of his grantor's title, without offering to rescind his contract of purchase of the premises, was no waiver of his right afterwards to insist upon a failure of consideration as a defence to the promissory note given for such purchase. *Ib.*

13. The defendant executed to the plaintiffs jointly a promissory note payable on demand, in order that by a suit thereon they might become secured for all unmatured liabilities that they were jointly or severally under as his sureties, and for all their individual claims against him. The amount of the note was greater than the joint liabilities of the plaintiffs for the defendants, but less than the aggregate of their joint and individual liabilities for him and their individual claims against him. *Held*, that from the mere acceptance of such a note by the plaintiffs, the law implied an agreement by them to apply its avails to the debts it was designed to secure, and that such implied agreement furnished a sufficient consideration for the note. *Hagood et al. v. Polley et al.*, 649.

14. *Held*, also, that such a transaction was equivalent to a special assignment of the defendant's property to the plaintiffs for the purpose of securing their liabilities for, and claims against, him, and, as such, was valid. *Ib.*

See CONTRACT 1; GUARANTY 1; OFFICER 2.

CONSTABLE. *See TOWN 1.*

CONSTRUCTION. *See LICENSE; MORTGAGE 3, 4, 5, 6, 7.*

CONTRACT.

1. If the plaintiff and defendant had, or thought they had, a similar interest, dependent on the settlement of the same question, and the defendant promised the other that, if he would commence and carry through a suit in his own name to settle such question, he would pay him one-half of the expenses incurred by him therein, when they should be ascertained. In consequence of and reliance upon such promise the plaintiff brought and prosecuted the suit to a final termination. *Held*, that the promise was founded upon a sufficient consideration. *Dorwin v. Smith*, 69.

2. At the time such agreement was made, it was mutually expected that the defendant would be called as a witness for the plaintiff on the trial of the suit. As the law then stood, he could not have testified if objected to on the ground of interest. *Held*, that such mutual expectation was not equivalent to a contract that the defendant should be called as a witness, and that, in the

absence of proof of any corrupt intent in such expectation, such an agreement was not void as contrary to public policy, or as *maintenance*. *Id.*

3. The offence of *maintenance* now seems to be confined to the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing litigation. *Id.*

4. *Held*, also, that such promise was not within the statute of frauds as being a promise to answer for the debt of another. *Id.*

5. *Indebitatus assumpsit* for money paid may be maintained upon such a contract to recover one-half the expenses sustained in such suit. *Id.*

6. In such case the statute of limitations would not begin to run until after the expense of the suit had been in fact paid by the plaintiff. *Id.*

7. A bill for a portion of such expenses was presented to the plaintiff, who thereupon lent the person claiming it a sum of money larger than the account, and took his note for the money with the understanding between them that the account was to go against the note when they should finally settle. *Held*, that this was equivalent to a payment of the bill by the plaintiff, so that he might recover one-half thereof of the defendant in assumpsit for money paid. *Id.*

8. In an executory contract for the sale of property to be received and paid for at a specified time, the purchaser, in order to recover damages for non-performance of the contract by the seller, must offer to receive the property and pay the price, at the stipulated time, unless the seller has put it out of his own power to perform the contract, and this fact is known to the purchaser, and he for that reason omits to make such offer. *Packer v. Button*, 188.

9. But the purchaser may, in such case, recover back the earnest money paid by him, if the seller before the time of performance has repudiated the contract and contracted to dispose of the property to another person, even though this fact be not known to the purchaser, who is only prevented from making a seasonable offer to perform on his part by an unforeseen accident which delays his arrival at the place of delivery until after the appointed time. *Id.*

10. *Held*, in such a case, that the purchaser could recover back the earnest money paid by him, without any demand upon the seller before suit. *Id.*

11. If a party who has contracted to labor for another for a certain time, at a fixed price per month, with a proviso, that if either party becomes dissatisfied before the expiration of the time agreed upon, he may terminate the contract, does become dissatisfied, and terminates the contract, he may recover for the time he has worked at the stipulated price per month. *Whitcomb v. Gorman*, 297.

12. The plaintiff, at the defendant's request, executed to an officer a receipt for certain property attached by him, and the defendant thereupon promised the plaintiff to indemnify him against all damage in consequence of signing such receipt, and to relieve him from all liability thereon by paying the

debt, upon which the property was attached, within a few days. *Held*, that this was a contract absolutely to pay the debt, and that the plaintiff could maintain an action thereon, upon the defendant's failure to pay it within the specified term, though the plaintiff had not been obliged to pay anything upon the receipt before the commencement of his action. *Hubbard's Adm'r v. Billings*, 599.

See CONSIDERATION 11, 12, 13, 14; FRAUDS; ILLEGAL CONTRACT.

CONVEYANCE. *See* CHANCERY 1, 2; CONSIDERATION 5, 6, 7, 8, 9, 10.

CORPORATION.

1. The plaintiff's charter required that ten thousand shares of stock should be subscribed before any assessments should be made. That number of shares was subscribed for, but the subscription contained a condition that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad should be put in operation. *Held*, that this condition was not a violation of the above-mentioned requirement of the charter. *R. & B. R. Co. v. Thrall*, 536.

2. The plaintiffs' charter provided that the directors might require payment of the sums subscribed to the capital stock, at such times, and in such proportions, as they should deem best. The subscription provided that the directors might, after the requisite number of shares was subscribed for, proceed to make assessments thereon for the purposes authorized by the charter, but that no assessment should exceed ten dollars on a share. The directors passed a vote that sixteen assessments of five dollars each be laid on the capital stock, to be called for by the treasurer at such times as the executive committee should direct. This executive committee was composed of four directors appointed by the board. In an action to recover these assessments upon the defendant's subscription, the declaration set forth the laying of these assessments, and alleged that the executive committee called for their payment at certain specified times. *Held*, that neither the charter nor the subscription prevented the directors from laying several assessments, not exceeding ten dollars each, by one vote; that the ratification by the directors of the acts of the executive committee in fixing the time for the payment of, and calling for, the several assessments so voted, made such acts the acts of the directors within the provisions of the charter and subscription. *Id.*

3. *Held*, also, that the declaration should allege that the time of payment of the assessments was fixed by the directors, and the call therefor issued by them, instead of by the executive committee. *Id.*

4. After the defendant's subscription and the organization of the corporation, the legislature authorized them to extend their railroad beyond its original prescribed limits, and the corporation accepted such addition to their charter without the defendants' consent. But another stockholder resisted the projected extension of the road, and the court of chancery enjoined the plaintiffs from proceeding under the new act, and they thereupon abandoned all action thereunder. *Held*, that this furnished no ground of defence to the defendant against his stock subscription. *Id.*

5. The legislature also, after the plaintiffs' organization, authorized them to issue preferred stock at a guaranteed rate of interest, which addition to their charter was accepted without the defendant's consent, and the preferred stock issued accordingly. *Held*, that this was a legitimate mode of raising money, and did not release the defendant from liability on his stock subscription. *Ib.*

6. The defendant, by his subscription to the plaintiffs' capital stock, promised to pay the several assessments thereon as they should from time to time be ordered, according to the act of incorporation. The act of incorporation provided that the directors should give notice of the several assessments, and of the time and place of their payment, in certain newspapers. *Held*, that it was a condition of the defendant's liability that such notice should be given as required by the charter, but that such condition might be waived by the defendant. *Ib.*

7. *Held* that, in this case, no such waiver was proved. *Ib.*

8. Before the passage of any statute relating to forfeiture of stock in a railroad company by reason of non-payment of assessments, and when the only legislative provision in reference to the matter in question was contained in the plaintiffs' charter, in the following words: "the directors may require payment of the sums subscribed to the capital stock at such times, and in such proportions, and on such conditions, as they shall deem best, *under the penalty of forfeiture of all previous payments thereon*;" *held*, that the proceeding by forfeiture was cumulative, and coexisted with the right to sue for the assessments; that in declaring a forfeiture of stock the plaintiffs must adopt a course of proceeding reasonable and just to the stockholder; that it was not necessary that the notice of the conditions on which the stock would be forfeited, should be issued when the calls for the assessments were made; that a declaration of forfeiture made August 15th, of all stock on which assessments should remain unpaid September²⁰th following, and requiring immediate notice of such declaration to be given to all delinquents, was reasonable; that, under such a declaration, a sale of the stock was not necessary to complete the forfeiture; that a stockholder whose stock had been thus forfeited, was thereby released from any further liability upon his subscription; and that the forfeiture would not take place unless the corporation gave reasonable notice to the delinquent stockholder, that his stock would be forfeited unless by a specified time the overdue assessments were paid. *Ib.*

See EVIDENCE 27, 28.

COSTS. *See* BOOK ACCOUNT 1; CHANCERY 3, 4; JURISDICTION 1; SERVICE OF PROCESS 2; TENDER OF AMENDS 1, 2, 3, 4.

COUNTERFEIT MONEY. *See* CRIMINAL LAW 1, 2, 3, 4.

COUNTY COURT. *See* JURY 2; WILFUL AND MALICIOUS ACT OR NEGLECT, CERTIFICATE OF, 1, 2.

CREDITOR. *See* CONSIDERATION 10; SALE 2, 3, 4.

CRIME. *See* CRIMINAL LAW; PRESUMPTION OF INNOCENCE.

CRIMINAL LAW.

1. In an indictment for passing a counterfeit bank bill, in setting out the tenor of the bill it was described as signed by *J. M. Thompson*. The bill offered in evidence was signed by *J. M. Thompson*. *Held*, that the two names were substantially *idem sonans*, and that there was no fatal variance. *State v. Wheeler*, 261.

2. The counterfeit bill offered in evidence contained the word "*three*" six times on the margin at the top of the bill, and also close upon the margin the words and figures "*capital stock \$100,000, secured by pledge of \$100,000 Pennsylvania 6 per cent. bonds.*" The indictment made no mention of these words. *Held*, that the words omitted were no part of the bill, and that there was no variance. *Id.*

3. The indictment charged the respondent with passing a counterfeit bank bill of the denomination of three dollars, purporting "to have been issued by the Andover Bank, a banking company incorporated by the legislature of the commonwealth of Massachusetts, made payable to E. F. or bearer on demand." *Held*, that the portion in italics was not an allegation of the purport of the bill, but of the due incorporation of the banking company, by whom the bill purported to have been issued. *Id.*

4. In an indictment in four counts, three for passing counterfeit bank bills, and the fourth for having in possession counterfeit bank bills, with intent to pass the same, the county court instructed the jury that there was no evidence to support either the second or fourth count, and that the respondent could not be convicted thereon. The jury returned a general verdict of guilty. *Held*, that this did not warrant the supreme court to set aside the verdict and grant a new trial. *Id.*

See DYING DECLARATIONS 1, 2, 3, 4, 5; INTOXICATING LIQUOR 1, 2, 3, 4, 5, 6; MOTION TO DISMISS.

CUSTOM. See CARRIER 6.

DAMAGES, See CONTRACT 8; FRAUD 5, 8, 9, 10, 12, 13, 14; TOWNS 1.

DECEASED PERSONS, ESTATES OF. See ESTATES OF DECEASED PERSONS.

DEED.

In a deed of real estate a reservation of the buildings and stones upon the land, so situated as to be part of the realty, with the privilege of removing the same by a certain time, reserves no title in the grantor to the property so reserved, if not removed within the specified time. *Judvine v. Goodrich*, 19.

See RECORD 1, 2; TROVER 1, 2.

DEMAND. See CONTRACT 19.

DEPOSITION.

1. By allowing a deposition to be read once without objection, a party waives all objections to and informality or irregularity in the taking of which he has knowledge, and thereafter he can only raise objections to the competency of the witness, or the subject matter of the deposition. *Randolph v. Woodstock*, 291.

2. When a legal cause exists for taking a deposition when taken, the cause is presumed to exist, and the deposition continues to be admissible at any subsequent time, unless the cause be shown to have ceased by the party objecting. *Ib.*

DEPUTY SHERIFF. *See* EVIDENCE 4; OFFICER 2.

DESCENT.

The legislature by a special act provided that A. should be heir-at-law of S., "in as full and perfect a manner as if she had been the latter's daughter, born in lawful wedlock." S. died before A. *Held*, that A. did not by virtue of this act become entitled to any share in the estate of a brother of S., who died intestate after S., and from whom S., if she had been living, would have inherited. *Moore v. Estate of Moore*, 98.

DIRECTORS. *See* CORPORATION 2, 3.

DISCONTINUANCE. *See* ARBITRATION AND AWARD.

DISCOUNT. *See* TRUSTEE PROCESS 12.

DIVORCE. *See* MARRIAGE 2, 4, 5, 6, 7, 8.

DOWER. *See* HOMESTEAD 8, 4.

DURESS. *See* OFFICER 3 4.

DYING DECLARATIONS.

1. Dying declarations, to be admissible in evidence as such, must have been made under the full and firm belief of near and approaching death. *State v. Centers*, 378.

2. Whether the declarations are made under such belief is to be decided solely by the court. *Ib.*

3. The interval of six days between the making of the declarations and the date of death, is not of itself sufficient to exclude them as evidence. *Ib.*

4. At the time of making certain declarations, sought to be introduced as dying declarations, the declarant stated that she knew she should die, but also remarked that *if she lived to get well* she would never go again to the place where the prosecution claimed she received the injury of which she died. At this time she was not regarded as dangerously sick by her physician or attendants. *Held*, that the declarations were not admissible. *Ib.*

5. Vague and indefinite expressions, and all language which does not distinctly point to the cause of death, and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible. *Id.*

EARNEST MONEY. *See* CONTRACT 9, 10.

ESTATES OF DECEASED PERSONS.

In the case of an appeal from the decision of commissioners on claims against the estate of a deceased person, where the appellant neglects to enter the appeal in the county court, and the appellee fails to enter the case for affirmance, no action can be maintained upon the bond given at the time of taking the appeal as required by section 20, chapter 52, Comp. Stat., even though no order of notice to the appellee of the appeal be made by the probate court, and no notice of the appeal be given him. *Probate Court v. Glead*, 24.

See TRUSTEE PROCESS 3, 4.

ESTOPPEL.

1. An estoppel *in pais* exists when a party makes a statement to another for the purpose of inducing a certain course of action, which statement that other relies and acts upon in the manner expected, and which in would be a fraud in the party making the statement to afterwards controvert, so far as the statement affects the other's pecuniary rights. *Shaw v. Beebe et al.*, 205.

2. The rule of estoppels *in pais* is equally applicable to affect the title of lands as of personal property. *Id.*

3. W. and S., by permission of a railroad company, erected a store on the land of the company, and were to own it in common. While the record title still remained in the company, S. advised W. to sell his share to L., and informed L. that if he bought it, he would be entitled to one-half of the rents. L., in reliance upon these statements of S., took a conveyance of one-half the store from W. and allowed W. \$500 for it towards the latter's indebtedness to him. S. witnessed the deed from W. to L., and was aware of its contents. Afterwards S. took a lease to himself of the whole store from the railroad company. *Held*, that he was estopped from claiming, in an action of ejectment, more than half of the store as against L. or his grantees. *Id.*

4. After the conveyance from W. to L., the latter conveyed his share in the store to another party, who entered into possession, claiming to own one-half of the property. While so in possession, S. conveyed the whole store to the plaintiff, who purchased in reliance upon the fact that the record title was solely in S., but with knowledge that L.'s grantee was in possession, and of his claim of title to one-half of the property. *Held*, that the possession of L.'s grantee with such a claim of title, was sufficient notice to the plaintiff of his

claim, to put the plaintiff on inquiry, and, therefore, having purchased without making proper inquiry, he was, equally with B., estopped from claiming more than half of the store. *Id.*

5. It is an essential element of an estoppel *in pais*, that the act, declaration or omission, which is claimed to constitute the estoppel, *actually induced* the other party to pursue a different course of action from what he otherwise would have pursued, and which, unless the estoppel is sustained, would prove injurious to him. *Wooley v. Edson et al.*, 214.

See EVIDENCE 5; PRINCIPAL AND SURETY 3, 4.

EVIDENCE.

1. Evidence that after the plaintiff's claim accrued he paid a claim of the defendant against him without any effort or proposition to apply it upon his debt against him, is admissible as tending to disprove the existence of the plaintiff's claim. *Strongs v. Slicer*, 40.

2. Where a long time has elapsed since a claim accrued, evidence is admissible upon the part of the defendant to show that during that time the plaintiff was in such pecuniary condition as to make it especially burdensome for him to go unpaid, and also to prove that during the same time the defendant possessed the means of paying the debt, if called upon. *Id.*

3. But it would not be competent for the defendant to prove that he was prompt and punctual in the payment of his debts. *Id.*

4. The record of the appointment of a deputy sheriff, made in the county clerk's office, is admissible evidence to prove his appointment, without proving the loss of the original deputation. So, in connection with such record evidence, parol evidence that one acted as sheriff, or deputy sheriff, is admissible to prove he was such. *Briggs v. Taylor*, 57.

5. The fact that the owner of property attached often met the attaching officer and knew how he was keeping the property and did not complain, is not competent evidence against his claim to recover of the officer for his negligence in keeping the property. *Id.*

6. Evidence is admissible for the purpose of affecting the credibility of a witness, to prove that he has testified to material facts upon a second trial which he omitted to relate upon the first. *Id.*

7. A pass book, upon which a party entered at the time memoranda of certain payments made by him upon a note which he owed, is not admissible as *independent* evidence by itself to prove such payments. But it may be referred to by such party, when a witness, for the purpose of refreshing his recollection of the fact, and it may go to the jury when used for that purpose, and also as confirmatory of the testimony of the party. *Lapham v. Kelly*, 195.

8. If the witness testifies that the facts were within his recollection when he made the memorandum, and that he is confident that he made it correctly

at or about the time of the transaction, the memorandum may go to the jury, in connection with his testimony, as evidence of the details of the matter, even though at the time of testifying he has only a general recollection of it. *Id.*

9. Upon the question of the amount of wool certain sheep would yield, and their value, evidence that the sheep compared favorably in those respects with the best flocks of sheep in the country, is too loose and vague to be admissible. *Melvin v. Bullards*, 268.

10. A witness who was testifying in regard to a certain date, stated that he wrote a letter to one R. relative to that subject; whereupon, he was asked on cross-examination whether he did not in that letter state such date as different from what he had testified it to be. *Held*, that the inquiry was proper, and that the cross-examining party was not bound to produce the letter. *Randolph v. Woodstock*, 291.

11. The mere fact that an improper inquiry is made of a witness while testifying, is not sufficient cause for granting a new trial, if no improper evidence be elicited by such inquiry. *Id.*

12. If a witness, before there is time to check him or interpose an objection, gives incompetent or improper testimony, and the court instruct the jury that the testimony so given is not to be considered by them, there is no ground of error which can be revised by the supreme court. *Id.*

13. *It seems* that physicians in general practice, and nurses accustomed to attend the sick, are *experts*, in respect to the mental capacity of sick persons. *ALDIS, J. Fairchild et al. v. Bascomb et al.*, 398.

14. Therefore, upon the trial of the question of the insanity of a testatrix, *it seems* it would be proper to describe to such a physician or nurse the symptoms and condition of the testatrix, when the will was executed, as disclosed by testimony, and to ask the witness what measure of mental capacity such a person would, in his opinion, possess, at so short an interval before death as that which elapsed between the execution of the will and the death of the testatrix. *ALDIS, J. Id.*

15. But *it seems* that a physician who for more than thirty years has devoted his attention almost exclusively to the treatment of insane persons, would not be an *expert* whose testimony in reply to such an inquiry would be competent, because the inquiry relates to the mental capacity of a person not previously insane, but in an enfeebled physical condition of long duration, and just about to die. *ALDIS, J. Id.*

16. In a trial involving the question of the sanity of a person, a medical witness who has heard the testimony, may give his opinion as to such person's sanity or insanity, as indicated by any given state of facts, so long as such facts are warranted by the evidence, and are not conflicting. *Id.*

17. But where facts on one side conflict with facts on the other, they ought not to be incorporated in one question, but the attention of the witness should

be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. *Ib.*

18. Therefore, in a trial involving the question of the sanity of a testatrix, the testimony on the opposite sides as to her sanity being very conflicting, the following question, put to an expert on the subject of insanity, was held to be improper, as involving so many facts that the witness would be obliged, in order to answer it, to settle in his own mind other disputed facts disclosed in the testimony; in other words, to assume the province of the jury. The question was as follows: "*If the facts stated by the witnesses on the part of the defence, touching the physical condition of the testatrix and her symptoms and conduct, are true, and the testimony of the witnesses on the part of the plaintiffs, relating to her conduct, is also true, what, in your opinion, was the mental condition of the testatrix in respect to sanity or insanity, at the time of the execution of the will?*" *Ib.*

19. It is not proper to inquire of a medical expert whether the person in question possessed sufficient mental capacity to transact business, or to make a will. The question should be so framed as to require the witness to state the degree of such person's intelligence or incapacity, in the best way he can. *Ib.*

20. A witness having been examined in respect to the sanity of the testatrix, it was held competent for the other side to show, as affecting the degree of credit to be given the witness, that a year previous to the trial, the witness had a severe disease of the brain, and that it had affected his mind. *Ib.*

21. When a witness upon cross-examination is inquired of in respect to a new subject; not connected with any matter for which his evidence was offered by the party introducing him, the cross-examining party can not contradict the reply of the witness to such inquiry. *Ib.*

22. Upon the question of the validity of a will, as relating to the sanity of the testatrix, or undue influence upon her, it is competent to show that she had brothers and sisters who were poor, for whom she cherished feelings of affection, and of whose poverty she was aware, and yet made no provision for them in her will; and also that the sole legatee, her brother, was known to her to be intemperate. *Ib.*

23. *Held, also*, that it was competent to show that for four years before the execution of the will, during a great portion of every year, her conduct, habits, and conversation were strange, unnatural, and different from what they were during the previous years of her life. *Ib.*

24. The false statements of the sole legatee, as to the execution and contents of the will, *held* admissible, as having some tendency to show undue influence by him upon the testatrix. *Ib.*

25. Evidence that a party at a former trial of a cause claimed, through his counsel, to defend the suit upon grounds wholly inconsistent with his present testimony, is admissible as tending to discredit such testimony. *Nye v. Marriam*, 438.

26. Cumulative evidence is additional evidence of the same kind to the same point. *Bradish v. State*, 452.

27. The plaintiffs' charter required that the directors should give notice of the assessments on the capital stock, and the time and place of payment thereof, in certain newspapers. *Held*, in the absence of any proof of a fair and diligent search for, and inability to find, such newspapers, in places where they would be likely to be, within the vicinity of the party, and reasonably accessible, that the testimony of a witness who stated that he had examined such newspapers, and that the notice was published therein as required by the charter, and also stated the contents of the notice, was incompetent. *R. & B. R. R. Co. v. Thrall*, 536.

28. *It seems*, that where proof of the successive publication of a notice in a newspaper is required, it is sufficient to produce one paper and show the contents, and then prove by parol that there were the requisite successive publications of the same notice. *ALDIS, J. Ib.*

29. Where a witness on the part of the plaintiff was enquired of on cross-examination, if the plaintiff had not assisted him in a law suit which the witness had had with the defendant, and the witness answered in the negative, *held* that it was competent for the defendant to contradict the witness in this respect by other testimony, with a view of discrediting the witness. *Hutchinson v. Wheeler*, 330.

30. A conversation between the respondent and her husband, tending to show an admission of her guilt to him, and overheard by a witness who was in an adjoining room, is not such a confidential communication, as the law excludes as evidence. *State v. Centers*, 378.

See CHANCERY 6; DYING DECLARATIONS 1, 2, 3, 4, 5; FRAUD 1; FRAUDULENT AGREEMENT, CONVEYANCE OR JUDGMENT 2, 3, 4; INTOXICATING LIQUOR 2, 6; JUDGMENT 5; POUND 1; PRESUMPTION OF INNOCENCE; SELECTMEN 2; SLANDER 1, 2; WARRANT 2; WILL 3.

EXCEPTIONS.

1. A party excepting to the judgment of the county court, has thirty days from the final adjournment of the court in which to file his exceptions. *Howard v. Burlington*, 491.

2. Under an order of the county court, made just previous to taking a recess, that executions on judgments consummated might issue immediately, *held*, that where a judgment had then been rendered for the plaintiff and he had been allowed exceptions thereto, but no stay of execution had been granted, he might at any time thereafter, before thirty days after the final adjournment of the court, and before filing his exceptions, waive them by giving notice thereof to the clerk, and having the entry of exceptions erased; but *otherwise*, if at the time of allowing exceptions the court had ordered a stay of execution. *Ib.*

3. When an exception appears in terms to have been taken in the county court, it is to be regarded as rightly before the supreme court, unless other parts of the bill of exceptions show to the reasonable satisfaction of the court, that it was not passed upon by the county court. *R. & B. R. R. Co. v. Thrall*, 536.

See WILFUL AND MALICIOUS ACT OR NEGLECT, CERTIFICATE OF, 1, 2.

EXECUTION.

1. *Quere*, whether the statute of 1854, relative to the appraisal of real estate situated in two or more adjoining towns in the case of a levy of execution hereon, applies to the case of a levy of an execution upon two pieces of land not adjoining each other, but situated in adjoining towns. *PIERPONT, J. Perrin v. Reeds*, 2.

2. But if, in such case, the appraisers are appointed partly from both towns the defect, if any, in the mode of appointing them, is so merely informal as to be cured by the neglect of both parties to apply within two years to the supreme court to vacate the levy, under the 49th sec. of chap. 45 of the Compiled Statutes, (sec. 26, chap. 47, General Statutes.) *Ib.*

3. The fact that an execution is levied upon real estate without noticing a mortgage which exists upon it, is a matter of which the debtor can not complain. *Ib.*

See ATTACHMENT 7; EXCEPTIONS 2; OFFICER 1, 2; WILFUL AND MALICIOUS ACT OR NEGLECT, CERTIFICATE OF, 2.

EXPERTS. *See* EVIDENCE 13, 14, 15, 16, 17, 18, 19.

FALSE REPRESENTATIONS.

The mere fact that a vendor made false representations respecting the article sold, and that the purchaser relied thereon, is not sufficient to sustain an action on the case against the vendor for such false representations. It must also appear that the vendor knew they were false. *Bond et al. v. Clark*, 577.

FALSE RETURN. *See* SERVICE OF PROCESS 4, 5.

FIXTURES.

1. The boilers and steam engine in a marble mill, which supplied the motive power of the machinery of the mill, and were set up and used for the beneficial enjoyment of the mill, and substantially annexed to it, *held* to be fixtures and part of the realty, notwithstanding the machinery moved by the engine could be readily removed without injury to the building. *Sweetzer v. Jones et als.*, 317.

2. Saw frames in such a mill, fastened, at the top and bottom, to the building by bolts and nuts for the purpose of steadying the saws, *held* to be chattels and not fixtures. *Ib.*

FORFEITURE. *See* CORPORATION 6; SCHOOL 3.

FRAUD.

1. The defendant sold the plaintiff certain stock, and executed to her at the time a written contract that he would repurchase it, if she desired, after a certain time at a stipulated price, and he afterwards did repurchase it at such price. *Held*, in an action by the plaintiff for fraudulent representations and concealment by the defendant in regard to the value of the stock, in connection with its repurchase, that parol evidence of what was said between the parties at the time the written contract was made, was admissible for the purpose of showing such a confidential relation of the parties, as rendered fraudulent the course of the defendant in making the repurchase. *Mallory v Leach*, 156.

2. *Held*, also, that if the defendant was aware that the plaintiff placed confidence in him to inform her fully of the value of the stock, and acted in reliance upon his representations in regard to its value at the time of his repurchase of it, and if this confidence was solicited by him, it was fraudulent in him to purchase it of her without communicating to her all the material knowledge he possessed in regard to it. *Ib*.

3. The defendant, being desirous of purchasing certain stock of the plaintiff, of the value of which he knew she was ignorant, for the purpose of misleading her and inducing her to sell the stock at less than its value, told her of a fact calculated in itself to depreciate the value of the stock, but omitted to disclose other facts within his knowledge which would have given her correct information of such value, and by this course succeeded in obtaining the stock at much less than what it was worth. *Held*, that the course of the defendant, under the particular confidential relations subsisting between the parties, was fraudulent and actionable. *Ib*.

4. The allegation of only a part of the truth, with the view of deceiving the other party, and inducing him to act differently from what he otherwise would, is equivalent to a false representation, and will avoid a contract thereby induced. *ALDIS, J. Ib*.

5. A party to a contract has a right to rescind it on account of the fraud of the other party as soon as he discovers the same; but if he elect to proceed and take his rights under the contract, he may still maintain an action against the other party for the damages occasioned by his fraud. *Ib*.

6. In an action for the price of land sold, the purchaser may set up in defence the fact that the vendor defrauded him by false representations as to the boundaries of the land. *Kelly v. Pember*, 183.

7. If the vendor of property takes the purchaser's note for the price payable to the vendor's wife, and no portion of the consideration moves from the wife, the note will be subject to the same defences in respect to the vendor's fraud in the sale, as if the note had been made payable to the vendor himself. *Ib*.

8. An offer to rescind a fraudulent sale is not necessary to entitle the purchaser to maintain an action to recover damages for the fraud, or to defend an action for the price to the extent of the amount of such damages. *Ib.*

9. Even when a negotiable promissory note is given for the price of property thus fraudulently sold, and the note remains in the hands of the vendor, the purchaser may, without any offer to rescind, interpose the fact of the fraud in defence to an action on the note, provided the damages occasioned by the fraud are not less than the amount of the note. *Ib.*

10. *Quere*, whether he has not the same right of defence to the extent of his damages, when they are less than the amount of the note. *Peck, J. Ib.*

11. W. and the plaintiff being tenants in common of certain land, the latter requested W. to sell it. W. sold it to the defendant, but the sale was induced by false representations by W. as to the boundaries, of which false representations, however, the plaintiff was ignorant. The defendant supposed W. to be the sole owner, and executed his two promissory notes for part of the price, payable to W.'s wife or bearer, and paid W. the balance of the price in money. The plaintiff afterwards conveyed his interest in the land to W. and received from him one-half of the money and one of the notes received from the defendant. *Held*, in an action upon this note, that the plaintiff was not so far a *bona fide* holder as to prevent the defendant from interposing in defence to the action the damages occasioned him by W.'s false representations, such damages being greater than the amount of the note. *Ib.*

12. A fraud unaccompanied by damage is not actionable. *Nye v. Merriam*, 438.

13. The defendant cheated the plaintiff in weighing some butter sold him by the latter, and reported the false weight to the plaintiff, but afterwards the plaintiff accepted from the defendant his note in payment for the butter, in a sum large enough to cover the contract price of the quantity actually furnished. At the time the note was given the plaintiff had forgotten the weight as originally reported by the defendant. *Held*, that in the absence of proof that the plaintiff had been put to any trouble or expense by the defendant's falsehood, he could not recover therefor. *Ib.*

14. Exemplary damages are allowable in an action on the case for deceit, when the evidence tends to show that the defendant wilfully purposed to deceive and defraud the plaintiff. *Ib.*

FRAUDS, STATUTE OF.

The plaintiff, having a demand against W., proposed to him to take in satisfaction thereof the agreement of the defendants, who were then indebted to W. in a larger sum, to pay the plaintiff a certain sum at a future time. W. thereupon requested the defendants to pay the plaintiff according to such proposition, and the defendants, in the presence of the plaintiff and W., agreed with the plaintiff so to do. *Held*, that the defendants' agreement was not within the statute of frauds. *Williams v. Little & Co.*, 323.

See CONSIDERATION 3; CONTRACT 4.

FRAUDULENT AGREEMENT, CONVEYANCE OR JUDGMENT.

1. The payment by a debtor to a creditor of his debt, before it is due, in order to aid the creditor in his purpose of preventing his creditors from attaching the debt by means of the trustee process, is not void as within the statute against fraudulent conveyances, agreements, &c., chapter 104, section 23, Comp. Stat.; Gen. Stat. chapter 113, section 32. *Fletcher v. Pillsbury and Trustee*, 16.

2. The defendant in a *qui tam* action for the penalty for taking a fraudulent judgment, was enquired of, six months after the judgment was taken, by the attorney of one of the creditors who claimed to have been defrauded, what his claim was upon which he had taken judgment. He replied that he could not tell, but that all the minutes were left in the files of the justice who rendered the judgment. The attorney immediately examined the justice's files, but could find no such minutes. *Held*, that these facts were not admissible in evidence against the defendant. *Barnum q. t. v. Hackett*, 77.

3. *Held*, also, that the subsequent declarations of one of the parties who confessed the judgment, but who was not a party to the present action, were not admissible to prove that his intent in confessing the judgment was fraudulent. *Ib.*

4. Such declarations, though made, as the party making them said at the time, while he was on his way to get his share of the money realized from the sale of his property upon the judgment obtained against him by the defendant, are not admissible in evidence as part of the *res gesta*. The *res gesta* consisted of an antecedent transaction, the confessing and taking the judgment. *Ib.*

5. In a *qui tam* action against the creditor in a fraudulent judgment, or the grantee in a fraudulent conveyance, for the statutory penalty, it is necessary that the intent of both parties to the transaction should be ultimately to defraud creditors. A design to hinder or delay them merely for a time is not within the statute. *Ib.*

6. The case of *Brooks v. Claves et al.*, 10 Vt. 37, approved and reaffirmed. *Ib.*

7. But if either party to such a mutually fraudulent conveyance or judgment consists of more than one person, those who participate in the fraudulent intent are not relieved from liability under the statute by the fact that all of such persons are not guilty of a criminal design. *Ib.*

8. In a *qui tam* action for the statutory penalty brought against the creditor in an alleged fraudulent judgment, the plaintiff called, as a witness, one of the firm who were the debtors in such judgment, who testified, among other things that his purpose in confessing the judgment was not to defraud their creditors, and that his partner's motive was the same as his. The plaintiff introduced other testimony tending to contradict this statement. *Held*, that the statement of the witness as to his and his partner's intent was not, as matter of law, conclusive, but that the plaintiff was entitled to have the cause submitted to the jury. *Ib.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS 1, 2, 3.

FRAUDULENT REPRESENTATIONS. *See* FRAUD 1, 2, 3, 4, 6, 11.

FREEMAN.

It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman. *Woodcock v. Bolster*, 632.

GOODS. *See* REPLEVIN 1.

GUARANTY.

1. The plaintiff having been retained by G. as his counsel in a law suit, and having already rendered services therein, the defendant, in a letter to the plaintiff, state : that he would hold himself accountable that G. should pay the plaintiff for all the services he had or might render him in such suit. An action having been brought upon this guaranty, and the case having been referred, the referee reported that the plaintiff in reliance upon this guaranty continued his services in the suit upon the faith that the defendant would pay agreeably to the terms of the letter; and, also, that the defendant expected and understood the plaintiff would continue his services in the suit after the letter was written, according to its terms. *Held*, that there was a sufficient consideration for the guaranty; that it sufficiently appeared that the defendant had notice of its acceptance by the plaintiff; that it was not necessary that the consideration of the guaranty should be expressed in writing; and that the guaranty covered both the past and future services of the plaintiff in the suit, and also his disbursements for the ordinary clerk and court fees therein. *Roberts v. Griswold*, 496.

2. *Held*, also, that the fact that by the terms of a law co-partnership formed by the plaintiff subsequent to the guaranty, but before the performance of the plaintiff's services upon the faith thereof, his partner was entitled to share with him in the pay for such services, constituted no ground of defence to the plaintiff's action upon the guaranty, the plaintiff having personally rendered all the legal services contemplated by it. *Id.*

GUARDIAN.

The testatrix, shortly before her death, made application to have her guardian removed. The justices of the peace appointed to examine into the necessity of a guardian, made their examination, but did not make their report till after the death of the testatrix. Upon the filing of their report, the probate court decreed that the guardian be discharged. *Held*, that such report and decree were void, and not admissible in evidence. *Fairchild et al. v. Bascomb et al.*, 400.

HOMESTEAD.

1. The act of 1857, (Acts of 1857, No. 28, p. 39,) providing for relief in certain cases where the homestead can not be conveniently set out in severalty, applies as well to the homestead left by deceased persons, as to that of persons in life. *Chaplin et al. v. Sawyer, Adm'r, et als.*, 286.

2. It is not requisite to the jurisdiction of the court of chancery under the act of 1857, relating to the homestead, to grant relief to the owners of a homestead left by a deceased person, that the probate court should first adjudge that there is a homestead in such deceased person's estate. *Ib.*

3. Under the act of 1856, (Acts of 1856, No. 23, p. 24,) providing that there should be no homestead right in the estate of a deceased person, the assets of which, over and above all debts due, and charges of administration, shall exceed \$500, the personal property assigned by the probate court to the widow, and the widow's dower, are not to be reckoned among the assets. *Ib.*

4. Under the laws of this state, relating to the homestead, in force in 1858, both homestead and dower may be set out in the same estate, but the dower is to be reduced by the amount of the widow's interest in the homestead. *Ib.*

5. A. agreed with the orator to buy a farm for \$1600, and gave a mortgage of his homestead, signed by himself and wife, to secure the payment of \$500 of the price. When this \$500 should be paid, he was to have a deed of the farm, and was to mortgage it back for the balance of the price. He took possession of the farm, and at the end of the year, being unable to raise the \$500, and the crator being unable to give a perfect title to the farm, it was mutually agreed between them not to go on with the trade, but that the mortgage of the homestead should stand as security for the value of the use of the farm for the past year, which was fixed at \$200. *Held*, that this agreement was binding as against the homestead. *Wood v. Adams et als.* 300.

HUSBAND AND WIFE.

An agreement made during coverture between husband and wife that certain personal property or funds belonging to him shall become her separate property, will be enforced in equity, if it is so far carried into effect as to separate the property or fund from the residue of the husband's estate, and place it in the name and exclusive control of the wife. *Cardell v. Ryder et als.*, 47.

See FRAUD 7.

ILLEGAL CONTRACT.

As a matter of law it is not always unnecessary to work on Sunday to prevent a great waste of sap, in making maple sugar. *Whitcomb v. Gilman*, 297.

See CONTRACT 2.

IMPOUNDER. *See* POUND.

INDEMNITY. *See* CONTRACT 12.

INDICTMENT. *See* CRIMINAL LAW 1, 2, 3, 4.

INHERITANCE. *See* DESCENT.

INJUNCTION. *See* RAILROAD 1.

INSANITY. *See* EVIDENCE 13, 14, 15, 16, 17, 18, 19, 20, 22, 23.

INTEREST. *See* CONSIDERATION 4.

INTOXICATING LIQUOR.

1. On an appeal from the judgment of a justice of the peace upon a complaint for selling, furnishing and giving away intoxicating liquor contrary to law, the county court may try the respondent for other offences than those in regard to which evidence was given before the justice, provided such additional offences were within the justice's jurisdiction under the original complaint. *State v. Remelee*, 562.

2. If a respondent in a prosecution for the unlawful sale of intoxicating liquor, plead guilty to a certain number of offences, without specifying in his plea the times at which such offences were committed, the record becomes conclusive, under the act of 1855, (Acts of 1855, No. 3, p. 8; Gen. Stat. chap. 94, sects. 37, 38,) that such offences were committed on the day stated in the complaint; and in another prosecution for offences committed prior to the day alleged in the complaint first tried, the respondent can not prove by parol that any of such offences are the same ones to which he pleaded guilty in the former prosecution. *State v. Haynes*, 565.

3. Where, in a prosecution for the illegal sale of intoxicating liquor, exceptions are taken by the respondent to the ruling of the county court, if the prosecuting attorney desires to have the sentence more severe because of the fact that the respondent has been previously convicted of a similar offence, he must prove such fact in the county court before the cause passes to the supreme court. Such proof can not be received in the supreme court, even for the purpose of affecting the sentence which such court are about to render, after having overruled the exceptions. *State v. Haynes*, 570.

4. Under the law regulating the sale of intoxicating liquor, a town liquor agent is not authorized to sell such liquor, except upon an application for it for an authorized purpose, and upon a representation reasonably inducing the belief that it is wanted for such purpose only. *State v. Fisher*, 584.

5. If the agent sell liquor without such an application and representation, and without any inquiry, or use of other means to ascertain, for what purpose it is wanted, and in fact it is procured and used for drink, and not for an authorized purpose, he is guilty of a violation of the law, as much so as if he were not agent. *Ib.*

6. In a prosecution against a town agent for the sale of liquor under such circumstances, evidence is inadmissible to prove his general reputation for prudence and caution in the discharge of his duties as agent. *Ib.*

See INTOXICATION.

INTOXICATION.

L. was apprehended and committed to jail in Chelsea under the 22nd section of the act of 1852, to prevent traffic in intoxicating liquors, (Acts of 1852, p,

28,) as having been found intoxicated in the town of Vershire. *Held*, that the town of Chelsea could not, on being notified by the jailer that L. was confined there and in need of relief, pay his board while in jail, and then recover the amount so paid of Vershire, but that if any obligation rested on Vershire to pay for his board while in jail, under that statute, it was a liability directly to the jailer, and not mediately through the town of Chelsea. *Chelsea v. Vershire*, 446.

JAIL. *See* INTOXICATION.

JOINDER OF PARTIES. *See* ABATEMENT.

JUDGMENT.

1. A judgment is conclusive, even between the parties, only of such facts as must have been found, in order to warrant the judgment. *Church v. Chapin*, 223.

2. In *scire facias* upon a sheriff's official recognizance, the previous judgment against the sheriff is conclusive of the plaintiff's right to a judgment against the sheriff and his bail, as against all defences which the sheriff might have urged in opposition to the suit against him alone, except when the judgment was rendered against the sheriff by default. *Bradley v. Chamberlin et als.*, 277.

3. A judgment is considered as rendered on the last day of the term of the court. *Bradish v. State*, 452.

4. A former judgment in a civil action is not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions. *Riker v. Hooper*, 457.

5. In an action for a trespass on the plaintiff's land committed in 1859, the defendant pleaded a right of way over the land, and gave evidence tending to support such right. The court ruled after the arguments were closed, that the evidence did not support the plea, because the right pleaded was more general than that attempted to be proved. The defendant thereupon obtained leave to amend his plea, on condition of the payment of costs, and the cause was continued under a rule that, if the costs were not paid within thirty days, judgment should be rendered for the plaintiff for nominal damages and costs. The costs were not paid nor the amendment made, and judgment was accordingly entered for the plaintiff. In another action between the same parties for a similar trespass in the same place, committed in 1860, in which the defendant pleaded and sought to prove the same right of way, *held*, that the former judgment was conclusive against the defendant's claim, and that the identity of the matters in dispute in the two cases might be shown by parol evidence. *Atwood v. Robbins*, 530.

See INTOXICATING LIQUOR 2; JURISDICTION 1, 2; PAUPER 4; POUND 1.

JURISDICTION.

1. If a court has no jurisdiction over the subject matter of an action, it can
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render no legal judgment in it, not even for the defendant to recover his costs, except when expressly authorized so to do by statute. *Collamer v. Page & al.*, 387.

2. But where an action is brought in the wrong town or county, there is not a want of jurisdiction of the subject matter of the suit, but only an irregularity in the process, and this objection must be taken while the cause is pending, or the judgment will be valid. *Id.*

3. In an action of debt upon a recognizance in the usual form to the defendant for the costs of prosecution, brought to recover the defendant's costs in the original action, the matter in demand, as respects the jurisdiction of the court, is the amount of such costs, and not the amount of the recognizance. *Edgerton v. Smith*, 573.

4. A justice of the peace is not legally disqualified to take jurisdiction of, and try, a case for the reason that he has previously, as one of a board of arbitrators between the same parties, and in reference to the subject matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion and expressed it to his associate arbitrator. *Batchelder v. Nourse*, 642.

See INTOXICATING LIQUOR 1; MARRIAGE 4, 5, 7; REPLEVIN 3; TRUSTEE PROCESS 5.

JURY.

1. A jury having settled their minds as to the rights of the parties, but being in doubt as to the proper mode of making a computation of what was due the successful party, called the county clerk into their room, and inquired of, and were correctly informed by him, how the computation should be made, and rendered a verdict accordingly. *Held*, that this course, though an irregularity, would not warrant the court in setting aside the verdict. *Densson et als. v. Powers*, 39.

2. *Held*, not to be error for a judge in charging the jury, after instructing them correctly upon all the points presented by counsel, to add that it was the fairest and best way for the jury to consider and determine the case mainly upon the grounds which had been taken and discussed by the counsel in the argument. *Melvin v. Bullards*, 268.

JUSTICE OF THE PEACE. See AUDITA QUERELA 1, 2; JURISDICTION 3, 4; TRUSTEE PROCESS 5.

LICENSE.

Where one in reply to the request of another for a license to do something in respect to the former's property, did not intend to accede to the request, but purposely used language susceptible of a double interpretation in this respect, with the intention that the other party should derive the impression that he did accede to his request, and the other did derive such impression and relied on it, *held* that he was bound to the same extent as if he had in express words granted the license. *Judevine v. Goodrich*, 19.

LIMITATIONS, STATUTE OF.

1. A debtor was summoned as the trustee of his creditor. He denied any liability to the creditor, and intended to appear and defend the trustee action, but, forgetting the day of trial, was adjudged trustee by default. *Held*, that neither the rendition of this judgment, nor the payment of it by the debtor, was such an acknowledgment of the creditor's claim as would prevent the operation of the statute of limitations. *Goodwin v. Buzzell*, 9.

2. Statements by a debtor, who, in the same conversation, denies the justice of an account, that, *if the other party would swear to it, he would pay it*, and that *he did not think the account just, but if it was just, he would pay it*, are not such acknowledgments of the debt as will take it out of the statute of limitations. *Ib.*

3. The fact that a debtor, who has been absent from the state more than six years, has had during that time, within the knowledge of the creditor, funds in the hands of a third person liable to be reached by the trustee process, will not bring the case within the operation of the statute of limitations, if the debt does not exceed ten dollars. *Watts v. Kavanagh and Trustee*, 34.

4. *Quere*, whether it would have that effect if the debt did exceed ten dollars. *Ib.*

5. The receipt by an assignee for the benefit of creditors of money upon one of the assigned demands, has no effect to remove the bar of the statute of limitations upon the debts of the assignor, for the benefit of which the assignment is made. *Hard v. Edgell*, 510.

6. Neither does it alter the effect of such receipt in respect to the statute of limitations, that the assignor himself, acting as clerk for the assignee, receives such money, and makes a memorandum on the assignee's books of such receipt. *Ib.*

See CHANCERY 9; CONTRACT 6; POUND 5.

MACHINERY. *See* ATTACHMENT 7.

MAINTENANCE. *See* CONTRACT 2, 3.

MANSLAUGHTER.

If a man, in order to have unlawful sexual connection with a female, by her consent uses artificial means to make such connection practicable, and by carelessness or negligence in the use of such means, inflicts upon her a wound which causes her death, he is guilty of manslaughter; as is also another person, who assists him in the use of such means, with knowledge of the purpose thereof. *State v. Centers*, 378.

MARRIAGE.

1. The legal system administered by the ecclesiastical courts in England, is a part of the common law of that country. *LeBarron v. LeBarron*, 365.

2. The power to grant divorces, and annul marriages for proper cause, has been an acknowledged head of jurisdiction in those courts from the earliest period. *Id.*

3. The settlement of this country by colonists from England, under the dominion and authority of that government, had the effect to make the general common law of that country the law of this also, so far as applicable to the new relation and condition of things. *Id.*

4. Jurisdiction of the subject of granting divorces, and annulling marriages, never having been exercised by the ordinary law courts in England, could not be exercised by the same courts in this country, until jurisdiction was given them by the legislature, and, until then, the jurisdiction was in abeyance, or rested in the legislature. *Id.*

5. But when jurisdiction of the subject is bestowed upon any tribunal, it is to be exercised and enforced according to the settled principles and practice of the English courts having the jurisdiction there, so far as applicable to the altered condition of things here, and not repugnant to the spirit of our constitution and laws; and it is not a mere statutory jurisdiction, where the power of the court is limited wholly to what the statute in terms authorizes. *Id.*

6. The settled practice in the English ecclesiastical courts in divorce suits for incurable impotence is, to require a medical examination to ascertain the truth of the allegation. *Id.*

7. Impotence being made by our statute a cause for nullifying a marriage, and the legislature having vested the supreme court with jurisdiction of the subject, the court have power to compel the defendant to submit to a medical examination, though the statute makes no provision for it. Whether in such case the court have power to compel the defendant to answer interrogatories on oath,—*quere*: its exercise refused in this particular case. *Id.*

8. *It seems*, that an application of the above principles would authorize the court to order the payment of temporary alimony, though not provided for by statute. *Id.*

MARRIED WOMAN. *See* HUSBAND AND WIFE.

MARSHALLING. *See* TRUSTEE PROCESS 1, 2.

MISTAKE. *See* CHANCERY 1, 2.

MORTGAGE.

1. If the holder of a promissory note endorse it to a third person and give the latter a mortgage to secure the payment of the note, the mere failure of the mortgagee to charge the endorser upon the note by presentment and notice of non-payment, will not release the land from the burden of the mortgage. *Mitchell v. Clark et al.*, 104.

2. To produce that effect there must have been, in addition to the failure to charge the endorser upon the note, such conduct on the part of the mortgagee as would prevent or hinder the mortgagor from collecting the note of the maker. *Ib.*

3. The question whether a conveyance of land and the cotemporaneous execution of a bond by the grantee to the grantor to reconvey upon the payment of the consideration of the deed and interest, constitute a mortgage or not, is one of fact, in the solution of which all the circumstances of the case are to be considered as evidence. *Rich v. Doanes*, 125.

4. Such cases are watched with jealousy by courts of equity, and in doubtful cases the transaction will be regarded as a mortgage. *POLAND, CH. J. Ib.*

5. In order to make such a transaction a mortgage there must be a debt to be secured thereby. *It seems* that the debt need not be in such form that it can be enforced by action against the debtor. *POLAND, CH. J. Ib.*

6. The facts in the present case that no note or other evidence of debt was executed by the grantor, and that the grantee went into immediate possession of the premises, were held to be evidence tending to show that the transaction was not a mortgage, while on the other hand, evidence that the grantor was in embarrassed circumstances at the time, and that the price paid for the conveyance was less than the value of the premises, was held to have a tendency to prove the transaction a mortgage. *Ib.*

7. Under all the circumstances of the present case the transaction was held to be a sale with a right of repurchase, and not a mortgage. *Ib.*

8. In such a case, if the grantor subsequently claims the transaction to be a mortgage, the grantee may maintain a bill in chancery to have it decreed to be otherwise. *Ib.*

9. The proceeding by petition in accordance with the act of 1852, entitled "an act to diminish the expenses of foreclosing mortgages in equity," (Acts of 1852, No. 12, p. 9,) is as proper in disputable as in undisputable cases of foreclosure. *Wood v. Adams et al.*, 300.

10. A mortgagee of certain land conveyed another piece of land, and in such conveyance described the property so conveyed as subject to his mortgage. *Held*, that, as against the grantee and all persons claiming under him, the land conveyed was as effectually charged with the incumbrance of the mortgage debt, as if it had been expressly mortgaged therefor. *Sweetzer v. Jones*, 317.

See CHANCERY 7, 8, 9; HOMESTEAD 5.

MOTION TO DISMISS.

A motion to dismiss an appealed criminal prosecution on the ground that the justice of the peace from whose judgment the appeal was taken, acted as attorney for the state upon the trial before himself, was held to have been

properly overruled; *first*, because the fact objected to did not appear on the record; and *secondly*, because the motion was not filed till the respondent had pleaded not guilty, and proceeded to trial in the county court. *State v. Haynes*, 565.

NEW TRIAL.

1. Under the statute requiring a petition for a new trial to be brought within two years next after the rendition of the original judgment, such time is to be computed from the last day of the term at which the judgment is rendered. *Bradish v. State*, 452.

2. In petitions for new trial where the state is the petitionee, service of the petition should be made upon the state's attorney of the county in which the petition is pending. *Ib.*

3. *It seems*, that if the petition be served upon the attorney who was counsel for the state in the original action, the service will be sufficient. *Ib.*

4. In a petition for a new trial, it is sufficient if the petition be sworn to by the party really in interest as petitioner, though not the nominal petitioner. *Ib.*

5. In a petition for a new trial on the ground of newly discovered evidence, it is not necessary that the petition be accompanied by a certified statement of the former trial given by the presiding judge, or by a recital of the evidence given at such trial. *Ib.*

6. The petition should set forth the history of the former trial fully enough to show the applicability and effect of the newly discovered evidence, and a statement of the newly discovered evidence itself, to which must be attached the affidavit of the party that the evidence is newly discovered, and also the affidavits of the new witnesses, as to what they will testify to. *Ib.*

See AUDITA QUERELA 1, 2; EVIDENCE 11, 12, 26; JURY 1.

NOTICE. See ATTACHMENT 1, 2; ESTOPPEL 4; GUARANTY 1; RECORD 1, 2; TRUSTEE PROCESS 6, 11, 12.

OFFICER.

1. If, after an officer has levied an execution upon personal property, and advertised it for sale, but before he has sold it, the property be taken out of his hands by replevin, and the officer thereupon returns the execution unsatisfied, stating in his return the facts in relation to the replevin of the property, he is entitled to his fees for travel and for poundage, and may recover the same of the execution creditor in an action of book account. *Baldwin v. Shaw*, 273.

2. The fact that, in such case, the levying officer is a sheriff, and that the writ of replevin is served upon him by one of his own deputies, and that such deputy is guilty of official negligence in not returning the replevin writ or

bond into court, furnishes no defence, in the nature of failure of consideration, to the sheriff's action for his fees on the levy of the execution. The remedy against the sheriff for his deputy's neglect must be enforced by an action *ex delicto*. *Ib.*

3. An officer, who had made an attachment of bank bills, refused to return them to the owner upon the dissolution of the attachment, unless the owner would agree that he might retain a part of them, as a pretended reward for the finding of them by the officer. *Held*, that such agreement was compulsory upon the debtor and not binding, and that he might recover the money so retained, or, upon evidence that he elected to avoid the agreement, it might be attached in a suit against him by trustee of the officer. *Lovejoy & Co. v. Lee and Trustee*, 430.

4. *Quere*, whether it could not be so attached without any such evidence? *Ib.*

See ABATEMENT; ATTACHMENT 3, 4, 6; FREEMAN; SCHOOL DISTRICT 1, 2, 3, 4; SERVICE OF PROCESS 3, 4, 5; TRUSTEE PROCESS 8, 9, 10.

OFFICE-HOLDER.

It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman. *Woodcock v. Bolster*, 632.

PARENT AND CHILD.

The plaintiff hired out his minor son to the defendant, and, while he was at work for the defendant, the plaintiff remarked to the defendant that he (the plaintiff) should let his son have half his wages. *Held*, that these facts did not constitute any implied authority from the plaintiff to the defendant to pay the amount of the boy's wages to the boy himself. *Winn v. Sprague*, 243.

PARTNERSHIP.

1. If land be bought with partnership money, and used for the partnership benefit, and the deed be taken to the partners jointly, it will be treated as partnership property, though the grantees are not described in the deed as partners. *Willis, Adm'r, v. Freeman et als.*, 44.

2. A creditor of one member of a partnership can not attach and hold the interest of such partner in any article of the partnership property, unless enough is left to satisfy the creditors of the firm, and if the partnership be insolvent, the partnership creditors have a right to have the partnership property applied to the payment of their debts. *Ib.*

3. But if, at the time of the attachment of the individual partner's interest in the property, the firm is not insolvent, their subsequent insolvency, even before judgment is obtained against the individual partner, will furnish no ground for preferring partnership debts to the lien acquired by such attachment. *Ib.*

4. The orator and defendant being partners, land was purchased for the partnership use, and with the expectation that it would be paid for by the firm, but, without the orator's knowledge, the defendant took the conveyance to himself alone, and gave his note for the price, which, however, was paid by him out of the partnership funds. Immediately upon the conveyance, the firm took possession of the land, and regarded and used it as partnership property for twenty-six years. *Held*, that the defendant held the title only as trustee for the firm, and he was decreed to so convey the land as to vest the title in the same manner as if it had been originally conveyed to the firm. *Dewey v. Dewey*, 555.

See GUARANTY 2.

PAUPER.

1. It is not requisite to the validity of an order of removal of a pauper, and its binding force upon the town to which the removal is ordered to be made, that there be an actual removal of the pauper under such order. *Poultney v. Sandgate*, 146.

2. It is a sufficient service of a notice of an order of removal if a certified copy of the same be left by an officer at the house of the usual abode of the overseer of the town to which the removal is ordered to be made, with a person of sufficient discretion then resident therein, even though the overseer never receives such copy, nor gets any actual notice of the proceeding. *Ib.*

3. The notice of the order of removal may be served upon the town to which the removal is ordered before the day fixed for the removal. *Ib.*

4. A valid order of removal of which notice is legally served on the town to which the removal is ordered, and from which no appeal is taken, is conclusive both as to the settlement of the pauper at the date of the order, and also as to all other facts necessary to uphold the order. *Ib.*

5. A pauper who had a legal settlement in the town of Somerset and who was, at the time of the annexation of one part of that town to Wilmington and another part to Stratton, maintained as a pauper by Somerset, and hired to be kept as such in the town of Wardsboro, was held to be an *absent person* within the meaning of the 9th clause of the 1st section of the 17th chapter Compiled Statutes, (General Statutes, p. 132.) *Wilmington v. Somerset*, 232.

6. Such pauper's settlement was held to be in Wilmington after such annexation, because her "last dwelling place or home" in Somerset before becoming a pauper of that town, was in that part of Somerset which was annexed to Wilmington, notwithstanding, after she became a pauper she was not kept in that portion of the town, but for a while in another part of Somerset, and afterwards in Wardsboro. *Ib.*

7. A pauper, while supported as such, has no "home or dwelling place" within the meaning of the statute, (Comp. Stat. chapter 17, section 1, clause 9.) *Ib.*

See INTOXICATION.

PAYMENT.

If one, owing two debts, overpay one of them, and there is any testimony tending to show that the parties mutually expected such overpayment to apply upon the other debt, it is error for the court, in an action upon the latter debt, (no plea of set off being filed,) to instruct the jury that such overpayment can not be regarded as a payment upon the debt in suit, but can only be treated as the basis of an independent action to recover it back, or of a plea of set off. *Lapham v. Kelly*, 193.

See ACCORD AND SATISFACTION; CONTRACT 7; FRAUDULENT AGREEMENT, CONVEYANCE OR JUDGMENT 1.

PENAL ACTION. *See* FRAUDULENT AGREEMENT, CONVEYANCE OR JUDGMENT 2, 3, 4, 5, 6, 7, 8; JUDGMENT 4; POUND 1, 3, 4, 5.

PETITION. *See* AUDITA QUERELA 1, 2; MORTGAGE 9; NEW TRIAL 1, 2, 3, 4, 5, 6.

PLEADING. *See* CORPORATION 3; MOTION TO DISMISS; PRACTICE 2; SCHOOL 1; VARIANCE.

POUND.

1. In an action by an impounder to recover the penalty prescribed by sec. 10, chap. 92, Comp. Stat., (Gen. Stat. chap. 100, sec. 10,) against the owner of the animal impounded, for not redeeming or replevying the beast, full proof must be made by the plaintiff, as in a criminal action. Therefore, where the question of the legality of the notice of the impounding by the impounder to the owner of the beast was in issue in such a penal action, *held*, that a judgment in favor of the impounder in an action of trover against him by the owner of the animal for illegally impounding it, which involved the sufficiency of such notice, was not admissible even as *prima facie* evidence of the legality of the notice. *Riker v. Hooper*, 457.

2. When there is not a sufficient pound in a town, one may impound in an inclosure of another person, as well as in his own. *Id.*

3. If, in a town where there is not a sufficient pound, one impounds an animal in the barn of the public pound-keeper, and does this because he is pound-keeper, and the latter consents to receive and keep the animal as public pound-keeper, the action for the penalty and the expenses of keeping the animal, provided by sec. 10, ch. 92, Comp. Stat., must be brought by the pound-keeper, and not the impounder. *Id.*

4. Such forfeiture does not include the expenses of keeping the animal, while impounded. They are separate and distinct matters, but they may be both recovered in one action. *Id.*

5. The claim for such forfeiture is not barred in nine months. *Id.*

POUND-KEEPER. *See* POUND.

PRACTICE.

1. Where the defendant is the excepting party, and the plaintiff fails to appear in the supreme court, the court will not treat the plaintiff as having become non-suit, but will hear the defendant *ex parte* upon his exceptions. *Winn v. Sprague*, 243.

2. Under a rule of court that in actions on a written instrument the plaintiff shall not be required to prove its execution by the defendant, unless the latter shall have filed a notice that he shall deny such execution, held, that the omission to file such a notice did not bar the defendant from proving that after he had executed the instrument it had been altered in a material respect. *Bigelow & Hoagland v. Stilphens*, 521.

See ARBITRATION AND AWARD; CHANCERY 4, 5; EXCEPTIONS 1, 2; INTOXICATING LIQUOR 3; JURY 1, 2; MORTGAGE 9; NEW TRIAL 4, 5, 6.

PRESUMPTION OF INNOCENCE.

If in a civil action a question arises, the determination of which involves the establishment of the fact that either party has been guilty of a criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome by a fair balance of testimony, not only the evidence introduced by the party so charged, but also the legal presumption of innocence which exists in every case. *Bradish v. Bliss*, 326.

PRINCIPAL AND AGENT.

1. Though in certain cases of long continued agency, notice of the revocation thereof is necessary to prevent the principal from being liable for the acts of the agent after his agency has been revoked, to those who contract with him in good faith upon the credit of his principal, yet this rule does not apply to cases where the agent had only a special authority to do a particular act or make a particular contract. *Watts v. Kavanagh and Trustees*, 34.

2. A hired man upon a farm who has had authority to lend the tools and personal property used on the farm, does not retain that authority, even so far as relates to his master, after the tools and property have been attached, and while they remain in the custody of the officer. *Briggs v. Taylor*, 57.

3. The implied authority arising from general employment continues even after the agency has in reality ceased, as regards parties who have before given, and continue to give, credit to it, and who have not actually received, and can not be presumed to have had, notice of the change. *Tier v. Lampton*, 179.

See ALTERATION OF INSTRUMENT 3; TRUSTEE PROCESS 14.

PRINCIPAL AND SURETY.

1. The request by a surety on a debt to the creditor to commence suit thereon, and secure the debt upon the principal's property, does not impose the

obligation upon the creditor to comply with the request, or to make good to the surety the amount that might have been secured by such an attachment. *Hickok v. F. & M. Bank et al.*, 476.

2. Neither do the facts that the surety resides out of the state, and is embarrassed and unable to pay the debt, that the bankruptcy of the principal is imminent, and that his personal property is known and easily attachable, that it can be attached without expense to the creditor, and that the surety's counsel is ready to see that the attachment is faithfully made, alter the rule of law in this respect, nor afford the surety any ground of relief against the creditor for not complying with his request to sue the principal, or to attach his property upon a suit already commenced, the service of the writ in which is not completed. *Ib.*

3. An assurance given by the payee of a promissory note to a surety thereon, at the time of its delivery, without which assurance the surety would not have signed the note, that if not paid at maturity the payee would immediately proceed to collect it out of the principal, accompanied by the fact that the payee suffered the note to remain unpaid for more than a year after its maturity without taking any steps to collect it, or notifying the surety of its non-payment, until after the failure of the principal, notwithstanding it might during that time have been collected of the principal, and the further fact that the principal relied on this assurance, and in consequence thereof omitted to take measures to secure himself, constitutes an equitable estoppel against the enforcement of the note against the surety, and relief will be granted him in that respect by a court of equity. *Ib.*

4. *Held*, that the proof in this case did not establish the fact that any such assurance was given. *Ib.*

5. A promissory note is not void as to a surety, on the ground that, without his knowledge, at the time of the delivery of the note the principal agreed to pay, and afterwards did pay, the holder an illegal rate of interest thereon. *Davis v. Converse et al.*, 503.

See CHANCERY 7, 8, 9; CONSIDERATION 13, 14; PROMISSORY NOTE 1, 2, 4.

PROBATE COURT. See GUARDIAN.

PROCESS.

The signature of the authority issuing a writ merely to the minute of recognizance at the foot of the writ, is not a sufficient signature of the writ; and for such a defect the writ will on motion be dismissed. *Andrus v. Carroll*, 102.

See SERVICE OF PROCESS.

PROMISSORY NOTE.

1. A note made payable to a bank, and executed for the purpose of raising money, may be taken by any person advancing money upon it, and held by

him as a valid instrument against the makers, both principal and sureties, enforceable by suit in the name of the bank. *Bank of Newbury v. Richards et al.*, 261.

2. So far as regards the liability of the sureties, there is no greater legal obligation upon the person taking and holding, in good faith, such note under such circumstances, to have it at the bank, to which it is by its terms payable, at its maturity or a reasonable time thereafter, or to notify the sureties that he holds the note, than rests upon the holders of promissory notes generally. *Ib.*

3. A promissory note, whether negotiable or not, which does not specify any place of payment in terms, is, in general payable wherever the person lawfully holding it, is. *Ib.*

4. Beyond the obligation of the holder of a promissory note not to contract with the principal for delay in enforcing payment, for a definite period, on sufficient consideration, the only rule of law prescribing duties to the holder of the note, in reference to sureties, is the general one of good faith and fair dealing. *Ib.*

5. The maker of a negotiable promissory note, which has been indorsed in blank by the payee, may rightfully pay it to, or settle it with, any person holding the same, provided he acts in good faith, and there is nothing in the circumstances tending to cause suspicion that the holder is not the rightful owner. *Ellsworth v. Fogg & Harvey*, 355.

See ACCORD AND SATISFACTION; ALTERATION OF INSTRUMENT 1, 2, 3; CHANCERY 7, 8, 9; CONSIDERATION 11, 12, 13, 14; FRAUD 7, 9, 10, 11; MORTGAGE 1, 2; PRACTICE 2; PRINCIPAL AND SURETY 1, 2, 3, 4, 5; TRUSTEE PROCESS 11, 12.

PUBLIC LANDS, DIVISION OF RENTS OF. See SELECTMEN 1, 2, 3.

RAILROAD.

A railroad corporation, being obliged by their charter to fence their road, for the purpose of constructing a permanent fence along their track through the orator's meadow land, which was liable to be overflowed, commenced to plant willow trees on each side of their track upon the land used by them for railroad purposes, and within three feet of the orator's line, with the expectation that they would grow, and be used to attach boards to, thus making a fence, which, in the judgment of the officers of the corporation, would be more permanent, serviceable and economical, than one constructed in any other manner. It having been proved that such trees, by growing and spreading their roots into, and their branches over, the orator's land would be a serious injury thereto, and that there was no controlling necessity for the construction of a fence in that particular manner, it was held, that the corporation might properly be enjoined, by a court of chancery, from planting such trees. *Brock v. Connecticut and Passumpsic Rivers R. R. Co.*, 273.

See CARRIER 1, 2, 3, 4, 5, 6; CORPORATION 1, 2, 3, 4, 5, 6, 7, 8; EVIDENCE 27, 28.

RECEIPT. *See* WILFUL AND MALICIOUS ACT OR NEGLIGENCE, CERTIFICATE OF, 3.

RECOGNIZANCE. *See* JUDGMENT 2; JURISDICTION 3.

RECORD.

1. The record of a deed in one town conveying land in such town is not of itself constructive notice of the conveyance by the same deed of land lying in another town. *Perrin v. Reeds*, 2.

2. But if one sees such record, and reads it and has such knowledge of the premises as to know from the description that the land in the other town was conveyed by the deed so recorded, this constitutes notice of the conveyance of the land in such other town. *Ib.*

REPLEVIN.

1. In the first clause of section 14, chapter 33, Comp. Stat., (Gen. Stat. p. 330, section 13,) providing that the action of replevin may be maintained for goods unlawfully taken or retained from the owner thereof, the term "goods" includes both animate and inanimate movable property. *Eddy v. Davis*, 247.

2. Replevin by a debtor of his goods when attached by a creditor, is not an adversary writ, and the writ is not to be entered in court upon the docket as in ordinary cases. It is only an appendage to the original action, and all proceedings in reference to it must be had as a part of the original action. *Green v. Holden*, 315.

3. An action of replevin was brought in a county where one of the parties resided, but not the county where the property replevied was detained, and for this reason the action was dismissed on motion. *Held*, that notwithstanding this disposition of the cause, the court had jurisdiction, and it was their duty, to render a judgment for a return to the defendant of the property replevied, without any proof of his right to have the property restored, and without any formal plea or avowry by the defendant; and that the plaintiff had no right to contest such a judgment on the ground that he owned the property. *Collamer v. Page et al.*, 337.

4. But a judgment for a return of the property, under such circumstances, is not conclusive of the right of ownership of the defendant thereto. That question may be tried in another action. *Ib.*

5. But after a dismissal of the action for some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detaining, or improper use of the property replevied, tried or adjudicated. *Ib.*

RESCISION OF CONTRACT. *See* CONSIDERATION 12; FRAUD 5, 8.

RESERVATION. *See* DEED.

RES GESTA. *See* FRAUDULENT AGREEMENT, &c., 4.

RETURN. *See* SERVICE OF PROCESS 4, 5.

SALE.

1. If the owner of personal property, which is in the hands of a third person, propose to sell it to another at a certain price, to be applied upon the vendor's indebtedness to the purchaser, it being understood that the adjustment of their accounts shall be made at some future time, and this proposition is accepted by the other party, and it is agreed between them that the person in possession shall be notified of the trade, the ownership of the property, as between the vendor and purchaser, passes by the bargain. *Woolley v. Edison*, 214.

2. But as to the vendor's creditors, the property will still be liable to be attached as belonging to him, until the party in possession is notified by the purchaser of the sale, and, in some cases, has been requested by him to keep the property for him. *Ib.*

3. *It seems*, that when property is sold while in the possession of a third person, a request by the purchaser to the bailee, to hold it for him, is necessary to perfect the sale as to the creditors of the vendor, only when the party in possession is a naked bailee, with no right of retention of the property. *POLAND, CH. J. Ib.*

4. One does not stand in a position to assert the peculiar rights of a creditor of a vendor to attach personal property sold without a change of possession, who commences a suit against the vendor and attaches the property in question, but afterwards abandons his attachment and suffers the property to go into the possession of the vendor, who then sells it and pays the attaching party's claim from the proceeds. *Ib.*

See CONTRACT 8, 9, 10; FALSE REPRESENTATIONS; WARRANTY 2.

SCHOOL.

1. In an action to recover for the breach by a school district of their contract of employment of a school teacher, it is not necessary to aver in the declaration that the plaintiff had procured from the town superintendent a certificate of qualification, as required by sec. 12, chap. 20, Comp. Stat. *Dogson v. School District*, 520.

2. The certificate of qualification, which teachers of common schools are required to obtain from the town superintendent, need not contain any statement in respect to good moral character. *Crosby v. School District*, 623.

3. A teacher of a common school does not forfeit his wages by reason of his neglect to answer the inquiries to teachers contained in the school register, and to certify to the correctness of his record of the daily attendance of the scholars. *Ib.*

4. But if, in consequence of such neglect, the school district loses a portion of the public money, the teacher must make good such loss to the district. *Ib.*

SCHOOL DISTRICT.

1. The officers of a school district do not become vacant merely by the neglect of the district to maintain a school as required by No. 32 of the acts of 1859, and No. 4 of the acts of 1860, (see General Statutes, chap. 22, sec. 40.) Such neglect merely furnishes a reason for vacating the offices, and they do not become vacant until the selectmen have made new appointments. *Woodcock v. Bolster*, 632.

2. If a clerk of a school district, who has been irregularly elected, acts as clerk *de facto*, and, as such, regularly calls an annual meeting of the district, the irregularity of his election will not affect the validity of the election of the officers regularly elected at such meeting. *Ib.*

3. If one be elected sole prudential committee of a school district who is by law ineligible, his assessment of a tax voted by the district will be invalid. *Ib.*

4. It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman. *Ib.*

SCIRE FACIAS. See BAIL ON MESNE PROCESS 1, 2, 3; JUDGMENT 2.

SELECTMEN.

1. The selectmen of a town in making division among the different religious societies of the rents of lands granted to the use of the ministry, as provided by sec. 5, chap. 89 of the Compiled Statutes, (Gen. Stat. chap. 97, sec. 5,) do not act in a ministerial but in a judicial capacity; and therefore are not liable for an erroneous division of such rents, provided in making it they act in good faith and with reasonable care and diligence, even though such error arose from improperly admitting or excluding evidence upon the matter in question. *Universalist Society v. Leach*, 108.

2. Neither the schedule of members of a religious society, as furnished by its clerk, nor its records, are conclusive evidence on the matter of such division by the selectmen, as to who are its members. *Ib.*

3. When the selectmen have determined the amount of such rents to which a religious society is entitled, the proffer to the society of an order on the town treasurer for the money is a sufficient discharge of the remainder of their duty in the matter. *Ib.*

See TRUSTEE PROCESS 13.

SERVICE OF PROCESS.

1. A subpoena for a witness may be directed to an indifferent person to

serve and return, and, if issued by a justice of the peace, an authorization endorsed upon the precept by the justice is not necessary. *Smith v. Wilbur*, 133.

2. An indifferent person serving a subpoena is entitled to full fees therefor. *Ib.*

3. The service of process by an officer of this state by leaving a copy thereof in another state, is invalid; and notice so given may be entirely disregarded. *Davis v. Richmond*, 419.

4. If an officer's return of the service of process is headed with the name of the state and a particular county, the various acts of service which his return sets forth, unless specifically mentioned as performed elsewhere, will be construed as alleged to have been performed in the county named at the head of the return. *Ib.*

5. Therefore, where a return, headed with the name of this state and one of its counties, stated that a copy of a petition of foreclosure was left with D., one of the defendants in the process, and no place was specified where such process was left with D., and in fact it was delivered to him by the defendant, a Vermont sheriff, in the state of New Hampshire, and D. did not appear in the cause, and a decree of foreclosure was taken against him, without any continuance of the cause, and a short time fixed for redemption, upon the expiration of which without payment, the tenant of D., then in possession of the premises, was ousted by virtue of the decree; *held*, that D. could maintain an action against the sheriff for making a false return. *Ib.*

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See NEW TRIAL 2, 3; PAUPER 2, 3.

SETTLEMENT OF ESTATES. *See* ESTATES OF DECEASED PERSONS.

SHERIFF. *See* JUDGMENT 2; OFFICER 2.

SLANDER.

1. In an action of slander for imputing a crime, the defendant may give in evidence under the general issue, in mitigation of damages, such facts as tend to show that at the time of speaking the words he believed they were true and that he spoke them in good faith. But such facts are not admissible for that purpose under such plea, if they amount to proof of the actual truth of the words charged. *Hutchinson v. Wheeler*, 330.

2. In an action of slander for charging the plaintiff with poisoning the defendant's cow, *held*, that under the general issue it was competent for the defendant to show in mitigation of damages, as tending to prove his belief in the truth of the words charged, that his cow had been poisoned; that for some time previous to the loss of the cow, there had been a bitter hostile feeling on the part of the plaintiff towards the defendant, that the defendant having at a former period poisoned the plaintiff's dog, the plaintiff had several times threatened to pay the defendant in his own coin; that the defendant had

attempted to instigate a malicious prosecution against the plaintiff; and that shortly before the plaintiff's cow was poisoned, a new quarrel had broken out between the parties. *Id.*

SOLDIER. *See* BAIL ON MESNE PROCESS 2, 3.

STATE. *See* NEW TRIAL 2, 3.

STATE'S ATTORNEY. *See* NEW TRIAL 2.

SUBPENA. *See* SERVICE OF PROCESS 1, 2.

SURETY. *See* PRINCIPAL AND SURETY.

SUNDAY. *See* ILLEGAL CONTRACT.

SUPREME COURT. *See* CRIMINAL LAW 4; EXCEPTIONS 2; INTOXICATING LIQUOR 3; MARRIAGE 5, 7, 8; PRACTICE 1; WILFUL AND MALICIOUS ACT OR NEGLECT, CERTIFICATE OF, 1, 2.

TAX.

1. A tax collector who has distrained property for the payment of a tax, may post such property for sale before the expiration of four days from the time of taking the property, provided the day fixed for the sale is six days from the expiration of the four days allowed the owner to redeem the property. *Harriman v. School District*, 311.

2. The erroneous declaration of a tax-collector at the sale of property distrained for taxes, that he has sold enough property to satisfy the tax and costs, and that he shall sell no more, does not prevent him from legally proceeding, on the same occasion and without any adjournment of the sale, to sell sufficient property to meet the tax and costs. *Woodcock v. Bolster*, 632.

See SCHOOL DISTRICT 8; TOWN 1.

TENDER OF AMENDS.

1. The party to whom a tender of amends and the accrued costs is made, is entitled to be tendered the travel and attendance fees of a witness whom he has in good faith subpoenaed to attend an approaching trial of the cause, provided there is not sufficient time before the trial by reasonable diligence to notify the witness not to attend, even though at the time of the tender no fees have been paid to the witness. *Smith v. Wilbur*, 133.

2. *Quere*, whether the non-attendance of the witness at the time appointed for the trial renders the rule otherwise. *Id.*

3. The party to whom the tender is made is not bound to inform the other party that he has summoned such witness, if no inquiry is made of him in regard to the fact or the amount of his costs. *Id.*

4. A tender of amends and the accrued costs, under the act of 1857, (Gen. Stat., chap. 25, sec. 44.) is not the subject of a plea in bar, nor a matter to be tried by the jury. Its effect is only upon the costs of the action, and that rests wholly in the discretion of the court. *Ib.*

TOOLS. See ATTACHMENT 7.

TOWN.

1. The measure of damages in an action against a town by the purchaser of land sold by the constable for taxes, to recover for the constable's neglect in his proceedings, in consequence of which no valid title was conveyed by his deed, is the amount of money paid by the purchaser for the deed, with interest. *Saulters v. Victory*, 351.

2. It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman. *Woodcock v. Bolster*, 632.

See INTOXICATION; TRUSTEE PROCESS 13.

TOWN TREASURER. See TRUSTEE PROCESS 13.

TROVER.

1. G. executed two notes, and a mortgage to secure the same, to E. & H., who transferred the notes and delivered the mortgage deed to the defendant. The defendant afterwards, but before any written assignment of the mortgage had been made to him by E. & H., sold and transferred the notes to the plaintiff, and agreed to get the mortgage deed, (which was then in the hands of another person, but subject to the defendant's order at any time,) and deliver it to the plaintiff. This the defendant afterwards refused to do. *Held*, that the plaintiff could maintain trover for the mortgage deed. *Gleason v. Owen*, 590.

2. *Held*, also, that trover would lie notwithstanding the defendant claimed that the transaction between him and the plaintiff was a payment, and not a purchase of the notes, and that he should cancel the mortgage deed, but would not assign it. *Ib.*

See WILFUL AND MALICIOUS ACT OR NEGLIGENCE, CERTIFICATE OF, 3.

TRUST.

1. S. devised a farm with the stock and tools thereon to the plaintiffs in trust for G. and his wife and children, during the life of G. and his wife, and at their decease to be divided equally between their children, with authority to the plaintiffs to permit G. to have the management of the trust property so long as from his habits of industry, frugality, &c., they should think it safe and prudent to do so.

Held, that though it was competent for the plaintiffs, by some positive act indicating such an intention, to surrender the control of this property to G.

whenever they saw fit, so as to vest in him the absolute ownership of it, yet the mere fact that he was suffered by the plaintiffs to live upon and carry on the farm, and to manage and take care of the stock, and to appropriate the avails of the same for the support of himself and family, was not an act of that character, and that even the stock raised by G. from the original stock so devised to the plaintiffs and taken care of by him, could not be attached and held upon his debts. *Roberts et. als. v. Hall*, 28.

2. *Held*, also, that the fact that the value of the property had been enhanced by the labor of G. would not give him a separable or attachable interest in any specific article. *Ib.*

3. The case of *Trask v. Donoghue*, 1 Aik. 370, questioned. *Ib.*

See PARTNERSHIP 4; TRUSTEE PROCESS 3, 4.

TRUSTEE PROCESS.

1. The trustee, having become liable for the defendants as receiptor, received from them a list of accounts and notes with a written agreement that they were turned out to him as security for liabilities assumed, or afterwards to be assumed, by him for them. Afterwards the trustee purchased property of the defendants and executed his notes to them therefor, with a verbal agreement that these notes should remain in his hands as security for all liabilities which he had contracted for them. While matters stood in this condition the plaintiffs brought the present trustee process. Afterwards the trustee assumed new liabilities for the defendants and took a written agreement from them, pledging as security therefor both the notes and accounts previously turned out to him, and also his own notes above described. The trustee afterwards made collections upon the demands so turned out to him. *Held*, that by their attachment the plaintiffs gained the right that the goods, effects and credits of the defendants then in the trustee's hands, as well as all collections which he should afterwards make on the demands turned out to him, should be applied on his liabilities for them, in accordance with the contract between them existing at the time the process was served; and that the trustee and defendants could make no new agreement in respect to such demands which could interfere with the lien which the plaintiffs acquired thereon by their attachment; and that therefore all collections made by the trustee, up to the time of disclosure, upon the demands so turned out to him before the service of the trustee process, should be applied solely upon liabilities incurred by him for the defendants before the trustee process was served. *Edgerton et als. v. Martin et als. and Trus.*, 116.

2. *Held*, also, that the case was a proper one for the application of the principle of equity that where one creditor has a lien upon two funds, and another creditor has a lien upon but one of the funds, the former will be compelled to resort for satisfaction, in the first instance, to the fund upon which he alone has a lien, if that course is necessary for the satisfaction of the claims to both parties. *Ib.*

3. One can not be charged as trustee on the ground of having mere securities for money in his hands belonging to the principal debtor. *Van Ames v. Jackson et al. and Trust.*, 173.

4. A note or bond given by a legatee to whom property was devised in trust to distribute it among the heirs of the testator, such note or bond being given for the distributive share of one of the heirs in such estate, and intended for his benefit, but made payable to another party, may be attached by the trustee process in a suit against such heir. *Ib.*

5. But where the trust under the will was merely to make such a distribution of the estate as should be equal, having regard to the amount which each heir had previously received from the testator, and on this basis the heir, for whose benefit the bond was given, was not entitled to any distributive share, and there was no consideration for the promise except the parental affection of the legatee for the heir; *held*, that such bond, being given to another person in trust for the heir, could not be attached by the trustee process in a suit against the latter. *Ib.*

6. In a trustee process, brought before a justice of the peace, whether before the justice or in the county court on appeal, a trustee who makes no disclosure will be held chargeable for the amount of the judgment against the principal debtor, though such judgment, by reason of the allowances of costs, exceeds one hundred dollars. *Harmon v. Harwood and Trustee*, 211.

7. The defendant verbally agreed to assign to the claimant a demand in his favor against the trustee, whereupon the trustee was called in, and, in the claimant's presence, was informed by the defendant that he had transferred his claim against him to the claimant, and was requested by the defendant to pay it to the claimant, and it was understood by all three of the parties that the trustee was to account to the claimant for the defendant's demand. *Held*, that the assignment from the defendant to the claimant was a present and perfected one, and that the notice to the trustee was sufficient to prevent the subsequent attachment of the claim by means of the trustee process by the defendant's creditors. *Hutchins v. Watts and Trustee*, 360.

8. When a commissioner is appointed in a trustee case, the whole case as to the liability of the trustee is referred, and when the commissioner professes to report the facts, and makes no reference to the disclosure as containing further facts, the statements in the disclosure can not be regarded by the court. *Longjoy & Co. v. Lee and Trustee*, 430.

9. Coin, bank bills or money, which have been attached on *mesne process*, and remain in the attaching officer's hands after the settlement of the suit, may be again attached by trusteeing the officer. *Ib.*

10. *Quere*, whether a debtor, who has, at the request of an officer having a writ of attachment against his property, and with knowledge that the officer desires to make an attachment thereon, unlocked a drawer in his house con-

taining bank bills belonging to him, has not so far put the officer within reach and control of the bills, as to deprive himself of the right to seize them while the officer is in the act of taking them, and thereby to defeat the attachment. *PECK, J. Id.*

11. But if the officer treats such bills as attached by him, and the debtor acquiesces therein, the officer will, after the dissolution of the attachment by the settlement of the suit, be held as the trustee of the owner of the bills. *Id.*

12. The principal debtor, at the time the trustee executed certain promissory notes to him, informed the trustee that he might wish to pass the notes to some banks, as collateral security, and in that connection mentioned the claimant and two other banks, and the trustee consented that the notes might be so used. Afterwards the defendant passed the notes to the claimant as collateral security for certain discounts which he obtained from the claimant on the faith of such security, and before the service of the trustee process he informed the trustee, though not by direction or in behalf of the claimant, that the notes were in the latter's hands. *Held*, that such notice to the trustee was not sufficient to protect the notes from attachment by the trustee process in favor of the creditors of the principal debtor. *F. & M. Bank v. Drury and Trustee*, 469.

13. *Held*, also, that the notes were not discounted by the claimant, within the meaning of the act of 1852, (Acts of 1852, No. 4, p. 4,) so as to render unnecessary a notice to the trustee by the claimant of the transfer of the notes, in order to protect them from attachment by the trustee process. *Id.*

14. Notice to a majority of the selectmen of a town, or to the town treasurer, of the assignment of a town order, is sufficient to prevent its attachment by the creditors of the assignor by means of the trustee process. *Thayer v. Lyman and Trustee*, 646.

15. If the assignee of such an order authorize an agent to present it to the town treasurer for payment, that constitutes sufficient authority to the agent to notify the treasurer of its assignment to his principal. *Id.*

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS 3, 4, 5; FRAUDULENT AGREEMENT, &c., 1; LIMITATIONS, STATUTE OF, 3, 4; OFFICER 3, 4.

USURY. *See CHANCERY 8, 9; PRINCIPAL AND SURETY 5.*

VACANCY. *See SCHOOL DISTRICT 1.*

VARIANCE.

In an action on the case by the seller of property for fraudulent representations and concealment by the purchaser in regard to its value, the price paid was set forth in the declaration less than it was proved on trial to have actually been. *Held* to be no variance. *Mallory v. Leach*, 158.

See CRIMINAL LAW 1, 2.

VOTER.

It is not a requisite qualification of a voter or office-holder in a town or school district, that he be a freeman. *Woodcock v. Bolster*, 632.

WAREHOUSEMAN. See CARRIER 2, 5, 6.

WARRANTY.

1. A simple affirmation is not a warranty, unless it was so intended and understood by the parties; and whether such was the intent and understanding is a question of fact. *Bond et al v. Clark*, 577.

2. In the case of a written contract of sale, containing no warranty, parol evidence is inadmissible to prove a warranty in connection with the sale. *Ib.*

WAY.

A right of way cannot arise from mere necessity, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership. *Tracy v. Atherton et als.*, 52.

WILFUL AND MALICIOUS ACT OR NEGLECT, CERTIFICATE OF.

1. In an action where the county court may grant a certificate that the cause of action arose from the wilful and malicious act or neglect of the defendant, &c., the allowance or refusal of such a certificate is ordinarily a matter resting in the discretion of the county court, and their decision can not be revised by the supreme court. *Soule v. Austins*, 515.

2. But it is otherwise, if the county court grant such a certificate where from the form of the action none can be legally granted, or if they refuse one upon the ground that the form of action does not allow it. *Ib.*

3. Though, where an officer has taken a receipt for property attached, and has allowed it to go back into the debtor's possession, he is, by a legal fiction, permitted to maintain trover for it, yet the failure of the receiptors to return the property is substantially a breach of contract and not a tort, and a certificate can not properly be given in such an action of trover, that the cause of action arose from the wilful and malicious act or neglect of the defendant, &c. *Ib.*

WILL.

1. In construing precatory words in a devise the court will look at the circumstances existing at the date of the will, and, if necessary, will construe words importing a trust as mere expressions of recommendation or confidence. KELLOGG, J. *Van Amee v. Jackson, et al. and Trus.*, 173.

2. The executor of a will who takes no benefit under it, is a competent witness to its execution. *Richardson v. Richardson et als.*, 238.

3. The declarations of a testator made after the execution of a will and on a different occasion, that he was induced to make the will by undue influence, are not admissible to prove the fact of such undue influence. *Id.*

See EVIDENCE 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24.

WITNESS. *See WILL* 2.

WRIT. *See PROCESS.*

Ex. J.G.

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